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HANDBOOK

OF THE LAW OF

SALE OF GOODS

BY

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PREFACE.

The Sale of Goods Act, 1893, by which the law relating to the sale of goods was codified in the United Kingdom, has now been adopted, with slight modifications, in all the provinces of Canada except Quebec, the process of adoption having been completed by the enactment in Ontario of the Sale of Goods Act, 1920. Prior to the adoption of the statute there existed, especially in Ontario, a considerable body of case law. This case law is of course now authoritative only so far as it is consistent with the statute; but for the most part they are in accord with each other, and the decisions furnish useful illustrations of the statute.

The arrangement of the statute is followed in the main, but in some respects the scheme of the book has necessitated some change in the order of the statutory provisions. The design of the book is to make the statute more readily available and more useful in Canada, and references are given to a relatively large number of recent English and Canadian cases. The alphabetical index is supplemented by an unusually full table of contents, and the comparative table of section numbers will, it is hoped, enable a reader readily to compare the statute in force in one province with that in force in any other province or in the United Kingdom.

Benjamin on Sales is cited with reference to the fifth edition (1906), and Chalmers on the Sale of Goods Act with reference to the seventh edition (1910), the new editions not being procurable in this country until after this book was wholly prepared for the press.

Attention is drawn in the course of the book to the chief differences between the provisions of the Sale of Goods Act and those of the Uniform Sales Act, which is in force in many parts of the United States.

J. D. F.

March, 1921.

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INTRODUCTION.

§ 1. Codification in the United Kingdom.

The draftsman of the Sale of Goods Act was Mackenzie Dalzell Chalmers (now Sir Mackenzie Chalmers). The following brief notes of the history of the statute in the United Kingdom are based upon the introduction to the first edition (1894) of his commentary on the Sale of Goods Act, 1893 (Sale of Goods, 7th ed. 1910, pp. vii, viii, ix). Further interesting particulars will be found in Chalmers' book.

A bill to codify the law relating to the sale of goods was originally drafted by Chalmers in 1888, and settled in consultation with Lord Herschell. In 1889 Lard Herschell introduced it in the House of Lords for the purpose of getting criticisms upon it, and it was subsequently criticized by Lord Bramwell and others. In 1891 it was again introduced in the Lords, and was referred to a select committee consisting of Lords Herschell, Halsbury, Bramwell and Watson, by whom it was carefully considered.

In 1892 it was again introduced in the Lords, and made applicable to Scotland, on the advice of Lord Watson, who had consulted various Scotch legal authorities. In the following year it was adopted in the House of Lords. In the House of Commons it was referred to a select committee and amendments were made. Some of these amendments were modified on the return of the bill to the Lords, and the statute was finally passed.

"The Bill, in its original form, was drafted on the same lines as the Bills of Exchange Bill. On Lord Herschell's advice it endeavoured to reproduce as exactly as possible the existing law, leaving any amendments that might seem desirable to be introduced in committee on the authority of the Legislature. So far as England is concerned, the conscious changes effected in the law have been very slight.

As regards Scotland, in some cases the Scottish rule has been saved or enacted for Scotland, in others it has been modified, while in others the English rule has been adopted."

§ 2. Codification in Canada.

It was only in an intermittent and haphazard manner that advantage was taken in the various provinces of Canada of the codification of the law of sale of goods effected in the United Kingdom in 1893. In 1896 the Sale of Goods Act was adopted in Manitoba, in 1897 in British Columbia, in 1898 in the Northwest Territories of Canada (parts of which were in 1905 formed into the Provinces of Alberta and Saskatchewan), and in 1910 in Nova Scotia.

In 1918, pursuant to recommendations made by the Canadian Bar Association, the governments of some of the provinces of Canada appointed commissioners for the purpose of promoting uniformity of provincial legislation. In the same year these commissioners, together with representatives of most of the other provinces, met in conference for the first time, and brought into existence a permanent assosociation under the name of the Conference of Commissioners on Uniformity of Legislation in Canada. This body meets once a year to consider subjects with regard to which it seems desirable and practicable that there should be uniformity of provincial legislation. In the intervals between the meetings of the Conference drafts of model statutes on various subjects are prepared by committees, and these drafts are submitted for revision to the commissioners when they meet in annual conference.

At an early date after its formation the Conference drew attention to the fact that the Sale of Goods Act had been adopted in some of the provinces, but that New Brunswick, Prince Edward Island and Ontario still enjoyed the doubtful advantages of the uncodified English law relating to the sale of goods. As a result of the action of the Conference the statute was adopted in New Brunswick and Prince Edward Island in 1919, and in Ontario in 1920. The Conference's committee on sale of goods and partnership reported in August, 1920, to the third annual meeting of the Conference, in part, as follows:

1. Your committee, consisting of the commissioners from Ontario, is glad to be able to report further substantial progress in the direction of securing uniformity of legislation on the subject of Sale of Goods and Partnership.

2. As mentioned in the report of your committee presented to the conference in 1919, the Sale of Goods Act, 1893, was adopted in New Brunswick and in Prince Edward Island in 1919, at the instance of the commissioners from these provinces respectively. Pursuant to the recommendation of the Conference made in 1919, and at the instance of the Ontario commissioners, the statute was adopted in Ontario in 1920. The result is that the statute is now in force in all the provinces of Canada except Quebec.

3. It is of interest to note that the Sale of Goods Act, 1893, originally enacted to codify the law of the United Kingdom, has been adopted in the following British dominions:

1895. Barbados, Gibraltar, Jamaica, Isle of Man, New Zealand, South Australia, Trinidad and Tobago, Western Australia.
1896. Ceylon, Hong-Kong, Manitoba, Queensland, Tasmania, Victoria.
1897. British Columbia.
1898. Northwest Territories of Canada (then including Alberta and Saskatchewan);
1899. British Honduras, Newfoundland;
1904. Bahamas;
1910. Nova Scotia;
1913. British Guiana;
1919. New Brunswick, Prince Edward Island;
1920. Ontario.

4. As noted in last year's report of this committee, the Factors Act, 1889, enacted by the British Parliament, had been adopted in Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario and Saskatchewan. Pursuant to the recommendation of the Conference it was also adopted in Prince Edward Island in 1920, at the instance

of the commissioners from that province. Your committee is informed that it will probably be adopted in Manitoba in 1921. In Quebec, articles 1735-1754 of the Civil Code of Lower Canada are based upon the former British legislation, superseded in the United Kingdom by the Factors Act of 1889.

(NOTE: The rest of the report relates to the subject of partnership. As a result of the action of the Conference the Partnership Act, 1890, which codified the general law of partnership in the United Kingdom, was adopted in New Brunswick, Ontario and Prince Edward Island in 1920, and is now in force in all the provinces of Canada except Quebec. In Quebec the subjects of sale of goods and partnership are governed by the Civil Code of Lower Canada. In Newfoundland the Partnership Act was adopted in 1892 and the Sale of Goods Act, as already mentioned, in 1899).

§ 3. Codification in the United States.

The creation in 1918 of the Conference of Commissioners on Uniformity of Legislation in Canada was due to some extent to the notable example afforded in the United States by the National Conference of Commissioners on Uniform State Laws. This body of American lawyers has been in existance since 1892. Its best known and most important achievement is the preparation of a Uniform Negotiable Instruments Act, which has been adopted in over fifty states and territories, but it has also prepared many other model statutes which have been widely adopted.

In 1902-3, at the request of the Conference of Commissioners on Uniform State Laws, Professor Samuel Williston, of the Harvard Law School, Cambridge, Massachusetts, prepared a draft of an act for codifying the law relating to the sale of goods. This draft was based on the Sale of Goods Act, 1893, but differed from it in various respects. It was printed in the summer of 1903 and it was sent, with a request for criticism, to teachers of the law of sales and to other experts on the subject. Some criticisms were received, and with the light of these criticisms and his own further reflections the the draftsman prepared a number of amendments and submitted them to the Conference in 1904. The draft was then

gone over carefully, section by section, by the Conference, and doubtful points and changes in wording were discussed and voted upon. The draft was then re-committed to the draftsman with instructions to incorporate in the draft the changes adopted by the Conference and to submit a revised draft in 1905.

In accordance with these instructions another draft was presented to the Conference in 1905. This draft included for the first time a number of sections on the transfer of property by means of negotiable documents, and on account of these sections it was thought best once more to re-commit the draft. In 1906 a revised draft was finally adopted by the Conference and recommended for enactment by the various state legislatures under the name of the Uniform Sales Act.

The Uniform Sales Act has been enacted to the following extent:

1907. Conecticut, New Jersey;
1908. Massachusetts, Mississippi (with slight modifications), Ohio, Rhode Island;
1910. Maryland;
1911. New York, Wisconsin;
1913. Arizona, Michigan, Alaska;
1915. Illinois, Nevada, Pennsylvania;
1917. Minnesota, North Dakota, Utah, Wyoming;
1919. Idaho, Iowa, Oregon, Tennessee.

In the course of the book attention is drawn to the more important differences between the provisions of the Uniform Sales Act and those of the Sale of Goods Act. There are no provisions in the Sale of Goods Act corresponding with the sections of the Uniform Sales Act (ss. 27-40), relating to negotiable documents of title.

CHAPTER I.

THE CONTRACT OF SALE.

§ 11. Definition of Contract of Sale.

The Sale of Goods Act (Ont. s. 3; U.K. s. 1) provides:

> 3.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.
>
> (2) A contract of sale may be absolute or conditional.
>
> (3) Where under a contract of sale the property in goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

The distinction drawn in sub.-ss. 3 and 4 between an agreement to sell and a sale is fundamental in the law of sale of goods. This distinction can, however, be more conveniently discussed in chapter 3, in connection with the rules which govern the passing of the property as between the seller and the buyer.

Whereas in the Sale of Goods Act the term "contract of sale" is used to express both an "agreement to sell" and a "sale," in the United States the term "contract of sale" does not occur in the Uniform Sales Act, and the terms "contract to sell" and "sale" are used throughout the statute, either in the alternative or singly as the context may require.

§ 12. The parties and their capacity.

The parties to a contract of sale are called the seller and the buyer. The Sale of Goods Act (Ont. s. 2; U.K. s. 62) defines the former as meaning a person who sells or agrees to sell goods, and the latter as a person who buys or agrees to buy goods.

The Sale of Goods Act (Ont. s. 4; U. K. s. 2) provides:

> 4.—(1) Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

(The rest of the section relates to necessaries—a subject which is discussed in § 13).

(1) *Lunatics and drunken persons.*

The general rule as to the contract of a lunatic (at all events if not so found by inquisition), or drunken man, who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests, is that such a contract is voidable at his option, but only if his state is known to the other party. The defendant who sets up his own incapacity as a defence must prove not only that incapacity but the plaintiff's knowledge of it at the date of the contract.

> Pollock, Contract, 8th ed., 1911, p. 97; Molton v. Camroux, 1849, 4 Ex. 17, 6 R.C. 71; Matthews v. Baxter, 1873, L.R. 8 Ex. 132; Imperial Loan Co. v. Stone, [1892] 1 Q.B. 599; Robertson v. Kelly, 1882, 2 O.R. 163; Murray v. Weiler, 1910, 3 Alta. L.R. 180; Bawlf Grain Co. v. Ross, 1917, 55 Can.S.C.R. 232, 37 D.L.R. 620, reversing 11 Alta. L.R. 26; Conrad v. Halifax Lumber Co., 1918, 52 N.S.R. 250, 41 D.L.R. 218.

(2) *Infants.*

An infant is not absolutely incapable of binding himself, but is, generally speaking, incapable of absolutely binding himself by contract. His acts and contracts are voidable at his option, subject to certain statutory and other exceptions.

Pollock, Contract, 8th ed., 1911, p. 56; see also Bruce v. Warwick, 1815, 2 M. & S. 205, 6 Taunt. 118, 6 R.C. 43; Cowern v. Nield, [1912] 2 K.B. 419 (infant not liable for the price of goods sold and delivered); Stocks v. Wilson, [1913] 2 K.B. 235; Leslie v. Shiell, [1914] 3 K.B. 606 (misrepresentation of age).

In Ontario it is provided by the Statute of Frauds, R.S.O., 1914, c. 102, s. 7 (re-enacting Lord Tenterden's Act, 9 G. 4, c. 14, s. 5), as follows:

7. No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless the promise or ratification is made by some writing signed by the party to be charged therewith or by his agent duly authorized to make the promise or ratification.

In the United Kingdom Lord Tenterden's Act has been superseded by the Infants' Relief Act, 1874, which provides as follows:

1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made dur-

ing infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

Both under Lord Tenterden's Act and under the Infants' Relief Act a distinction must be made between a contract which is not binding upon an infant unless he ratifies it after attaining his majority, and a contract which is binding on him unless he repudiates it within a reasonable period after attaining his majority. If a contract is of a continuing character, or if under a contract an infant acquires an interest in permanent property to which obligations attach, as, for instance, shares in a company, he must, in order to avoid the obligations, repudiate the contract and disclaim the property, if any, within a reasonable period after coming of age. As no ratification is required in such a case, the statutes in question do not apply.

Edwards v. Carter, [1893] A.C. 360, affirming Carter v. Silber, [1892] 2 Ch. 278; Carnell v. Harrison, [1916] 1 Ch. 328; cf. notes to Bruce v. Warwick, in 6 R.C. 50 ff.; Millson v. Smale, 1894, 25 O.R. 144; Re Sovereign Bank, Clark's Case, 1916, 35 O. L.R. 448, 27 D.L.R. 253.

But in the case of contracts by infants to do isolated or single acts, as, for instance, a contract for the sale of goods, a ratification by the infant after coming of age was necessary at common law to render him liable. Under the Infants' Relief Act, 1874, such a ratification is now void, even though made on new consideration, and under Lord Tenterden's Act ratification is unenforceable unless it is in writing.

Smith v. King, [1892] 2 Q.B. 543; Louden Mfg. Co. v. Milmine, 1907, 15 O.L.R. 53; Great West Implement Co. v. Grams, 1908, 1 Alta. L.R. 411.

A person may, however, render himself liable upon a new promise made after attaining his majority, as distinguished from the ratification after attaining his majority of a promise made during his infancy.

Ditcham v. Worrall, 1880, 5 C.P.D. 410; Smith v. Jamieson, 1889, 17 O.R. 626.

§ 13. Necessaries.

The Sale of Goods Act (Ont. s. 4; U. K. s. 2) provides:

> 4.—(1) Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property:
>
> Provided that where necessaries are sold and delivered to an infant or minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.
>
> (2) Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Notwithstanding that usually the contract of an infant, lunatic or drunken person is voidable at his option (if in the case of the lunatic or drunken person his state was known to the other contracting party), he may be liable for necessaries.

In the statute the legal liability to pay and the incapacity to contract are put side by side as co-existent, and the infant or other person who is incompetent to contract would seem to be liable for necessaries, not because he is in this respect able to contract, but because he is bound *quasi ex contractu.*

> Anson, Contract, 15th ed. 1920, pp. 141-2; Nash v. Inman, [1908] 2 K.B. 1, at p. 8.

The statutory definition of necessaries states the result of many decisions. The English cases are collected in Benjamin, Sale, 5th ed. 1906, pp. 46 ff., and 17 Halsbury, Laws of England, pp. 67-69, 25 Halsbury, *op. cit.,* pp. 124, 125.

In Roberts v. Gray, [1913] 1 K.B. 520, it was decided that a contract by an infant for necessaries and for his benefit is binding on him,and cannot be repudiated by him on the ground that it is partly executory. At pp. 525-6, Cozens-Hardy M.R. said:

> We have had our attention called to a great number of cases dealing with the circumstances under which and the extent to which an infant may be bound by, and be incapable of repudiating, a contract made by him during infancy. Far be it from me to say that there has not been

some development of the law since the age when the earliest cases which have been cited were decided, but it is important to remember that as early as Coke — Co. Litt. 172 A — it has been held that an infant's contract for necessaries is binding, and it was laid down by him that that doctrine also applied not merely to bread and cheese and clothes, but to education and instruction.

An infant cannot be sued on a negotiable instrument or a bond with a penalty, even though given for the price of necessaries, but he may be sued for the reasonable price of the necessaries, and apparently he may be sued on a bond without a penalty given for necessaries, the claim being treated as one upon a simple contract.

In re Soltykoff, [1891] 1 Q.B. 413; Walter v. Everard, [1891] 2 Q.B. 369; Beam v. Beatty, 1902, 4 O.L.R. 554.

A person maintaining a lunatic is entitled to recoupment from the estate of the lunatic, having regard to the position in life of the lunatic. A person who lends, to the person maintaining the lunatic, money which is applied in the provision of necessaries for the maintenance of the lunatic, is entitled to be subrogated to the position of creditors for such necessaries who have received payment out of the money advanced.

In re Beavan, [1912] 1 Ch. 196.

§ 14. The subject matter of the contract.

The Sale of Goods Act (Ont. s. 2; U. K. s. 62) provides:

"Goods" shall include all chattels personal other than things in action and money; and shall include emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

A distinction has been drawn as to [the sale of crops] between what are called emblements, crops produced by cultivation, or *fructus industriales*, and growing grass, timber, or fruit upon trees, which are called *fructus naturales*. The law is settled thus. If the property is to pass *after* the crops are severed from the soil, then both *fructus naturales* and *fructus industriales* are goods within the meaning of the . . . Sale

of Goods Act. If the property is to pass before severance *fructus industriales* are goods, but *fructus naturales* are an interest in land.

Anson, Contract, 15th ed., 1920, p. 83.

Most of the decisions before the Act arose on construction of the Statute of Frauds [see chapter 2, § 23], which uses the expression "goods, wares, and merchandises," and this expression was somewhat artificially extended in order to bring contracts of sale within the 17th section of that Act rather than the 4th, which does not recognise part performance. Obviously decisions on those words must be applied with caution to the present definition, which applies not only to s. 4 [Ont. s. 6: see chapter 2, § 24] (reproducing the 17th section of the Statute of Frauds), but to the whole Act.

Chalmers, Sale of Goods, 7th ed., 1910, p. 143.

As to "goods," see also Benjamin, Sale, 5th ed., 1906, pp. 173 ff.; 25 Halsbury, Laws of England, p. 112. As to crops, standing timber, etc., see Crosby v. Wadsworth, 1805, 6 East 602; Smith v. Surman, 1829, 9 B. & C. 561, 23 R.C. 230; Marshall v. Green, 1875, 1 C.P.D. 35; McNeill v. Haines, 1889, 17 O.R. 479; Handy v. Carruthers, 1894, 25 O.R. 279; Morgan v. Russell & Sons, [1909] 1 K.B. 357.

The Sale of Goods Act (Ont. s. 7; U. K. s. 5) provides:

> 7.—(1) The goods which form the subject of a contract of sale may be either existing goods owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."
>
> (2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.
>
> (3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

As to the distinction between existing and future goods and its consequences, see chapter 3.

Goods are also distinguished as being specific or ascertained and generic or unascertained. This distinction is also discussed in chapter 3.

§ 15. Destruction or deterioration of the goods.

(1) *Before the contract.*

If one person purports to make with another a contract of sale relating to specific goods which unknown to the parties have ceased to exist at the time of the contract, the contract is void on the ground of mutual mistake.

Couturier v. Hastie, 1852, 5 H.L.C. 673, 23 R.C. 204.

The rule is confined to specific goods, that is, which, as defined by the Sale of Goods Act (Ont. s. 2; U.K. s. 62), are "identified and agreed upon at the time the contract of sale is made."

The Sale of Goods Act (Ont. s. 8; U. K. s. 6) provides:

> 8. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

"Perish" is not defined in the statute, but it is apprehended that the goods would have "perished," not only if they were physically destroyed, but also if they had ceased to exist in a commercial sense, that is if their merchantable character, as such, had been lost, as dates contaminated with sewage, and therefore unsaleable as dates (Asfar v. Blundell, [1896] 1 Q.B. 123: insurance), or cement which had lost, through moisture, its properties as such (Duthie v. Hilton, 1868, L.R. 4 C.P. 138: freight); or a ship which is a mere congeries of timber (per Parke B. in Barr v. Gibson, 1838, 3 M. & W. 400), or has ceased to be capable of carrying a cargo (per A. L. Smith M.R. in Nickoll v. Ashton, [1901] 2 K.B. 126 at p. 133.

Benjamin, Sale, 5th ed., 1906, p. 140; see also Chalmers, Sale of Goods, 7th ed., 1910, p. 28.

In the United States it is provided by the Uniform Sales Act as follows:

> 7.—(1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale

(a) as avoided, or

(b) as transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.

(2) *After the contract.*

If the specific goods which are the subject matter of the contract perish or become deteriorated after the making of the contract, the effect of the destruction or deterioration of the goods is a question of the operation or performance of the contract.

The general rule is that the goods are at the risk of whichever of the parties is the owner of the goods—*res perit domino* —but the parties may vary the rule by the terms of the contract and the rule is subject to modification if the loss is caused by the fault of either party.

Martineau v. Kitching, 1872, L.R. 7 Q.B. 436; Inglis v. Richardson, 1913, 29 O.L.R. 229, 14 D.L.R. 137.

The Sale of Goods Act (Ont. s. 22; U.K. s. 20) provides:

22. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not, provided:

(a) That where delivery has been delayed through the fault of either the buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

(b) That nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

"Fault" is defined by the statute (Ont. s. 2; U. K. s. 62) as meaning "wrongful act or default." The question when the property in goods passes from the seller to the buyer is discussed in chapter 3.

It follows from the general rule above stated that where there is a contract to sell specific goods, and subsequently without any fault on either part, the goods perish after the property has passed to the buyer, the buyer, in the absence of an agreement to the contrary, must bear the loss and is liable on the contract notwithstanding that the goods have perished.

The result is different if the goods perish before the property passes to the buyer, and the Sale of Goods Act (Ont. s. 9; U. K. s. 7) provides:

> 9. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby voided.

In the United States the Uniform Sales Act (s. 8) makes special provision, not only for the case of the goods wholly perishing, but also for the case of part of the goods perishing or the whole or a material part of the goods so deteriorating in quality as to be substantially changed in character. Cf. s. 7 of the same statute, quoted above.

Special provision is also made by the Sale of Goods Act (Ont. s. 32; U. K. s. 32) for the case of the seller's failure to make such contract with the carrier on behalf of the buyer as may be reasonable. The buyer must, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit (Ont. s. 33; U. K. s. 33). For the text of these sections, see chapter 6, § 65.

§ 16. The consideration for the contract.

Under the Sale of Goods Act (Ont. s. 3; U.K. s. 1) the consideration is "a money consideration, called the price."

Chalmers (Sale of Goods, 7th ed., 1910, p. 6) says that "apart from the statute, it seems that rules of law relating to sales apply in general to contracts of barter or exchange; but the question has been by no means fully worked out. The bill originally contained a clause applying its provisions *mutatis*

mutandis to exchanges, but the clause was cut out by the Commons Select Committee." In the United States the Uniform Sales Act (s. 9) provides that the price may be made payable in any personal property.

If the consideration consists partly of money and partly of goods, the principles relating to sales, and not those relating to barter or exchange, apply.

Mason & Risch v. Christner, 1920, 48 O.L.R. 8, 54 D.L. R. 653.

The Sale of Goods Act (Ont. ss. 10,11; U. K. ss. 8, 9) provides:

10.—(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

11.—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

"Fault is defined by the statute (Ont. s. 2; U. K. s. 62) as meaning "wrongful act or default."

CHAPTER II.

THE STATUTE OF FRAUDS.

§ 21. Formalities of the contract.

Generally speaking, and apart from statute, contract in English law is formless, that is to say, no special form is required; a contract for valuable consideration is enforceable although there is no seal, or no writing, and even though the contract is merely implied from conduct. There is an exception in the case of contracts of corporations, which according to the old rule must be under seal. This rule has, however, been to a large extent eaten up by exceptions.

The general principle that no special form is required for a contract of sale is expressed in the Sale of Goods Act (Ont. s. 5; U. K. s. 3), as follows:

> 5. Subject to the provisions of this Act and of any statute in that behalf a contract of sale may be made in writing, either with or without seal, or by word of mouth or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties; Provided that nothing in this section shall affect the law relating to corporations.

§ 22. Section 4 of the Statute of Frauds.

Important exceptions to the rule that no special form is required for a contract of sale were made by the Statute of Frauds, 29 Car. 2, c. 3, ss. 4 and 17.

Section 4 of that statute is as follows:

4. And from and after the said four and twentieth day of June [1677] no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement which is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

This section has been re-enacted in Ontario in substantially the same terms: R.S.O. 1914, c. 102, s. 5.

In a book specially devoted to the law of sale of goods it is not necessary to comment at length on s. 4. Ordinarily a contract for the sale of goods will not come within s. 4, but it may happen that it comes within this section as well as within s. 17 of the Statute of Frauds or the corresponding provision of the Sale of Goods Act. It has been held, for instance, that s. 4 of the Statute of Frauds, so far as it relates to agreements not to be performed within the space of one year from the making thereof, applies to agreements for the sale of goods, and is not repealed by the Sale of Goods Act. Therefore an agreement for the sale of goods is not taken out of the operation of s. 4 of the Statute of Frauds by reason of there having been acceptance and actual receipt by the buyer of part of the goods sold.

Prested Miners Co. v. Gardner, [1911] 1 K.B. 425; as to acceptance and receipt, see § 26.

§ 23. Section 17 of the Statute of Frauds.

S. 17 of the Statute of Frauds, 29 Car. 2, c. 3, is as follows:

17. And be it enacted, that from and after the said four and twentieth day of June [1677], no contract for the sale of any goods, wares, and merchandises, for the price of ten

pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part-payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully autthorized.

The use of the word "bargain" in the section lent some support to the argument that the section applied only to a "bargain and sale," that is, a sale as distinguished from an agreement to sell. In 1828 all doubt as to the application of s. 17 to executory contracts was removed by s. 7 of Lord Tenterden's Act, 9 G. 4, c. 14, which, after reciting s. 17 of the Statute of Frauds and a corresponding Irish statute, enacted:

That the said enactments shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.

S. 17 of the Statute of Frauds and s. 7 of Lord Tenterden's Act were re-enacted in Ontario in a consolidated form (R.S.O. 1914, c. 102, s. 12), in which by error the word "price" was retained instead of the word "value," notwithstanding that it had been held in England that the effect of reading the two sections together was that the word "value" must be read into s. 17 in place of the word "price."

Harman v. Reeve, 1856, 18 C.B. 586 (agreements for sale and for agistment in one contract); Willis, Sale of Goods, p. 63.

§ 24. The Sale of Goods Act.

The Statute of Frauds, s. 17, and Lord Tenterden's Act, s. 7, have now been replaced by the Sale of Goods Act (Ont. s. 6; U. K. s. 4) which provides:

6.—(1) A contract for the sale of any goods of the value of forty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods

so sold, and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section shall apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

In the United Kingdom the amount mentioned in sub-s. 1 is £10, and it is provided by sub.-s. 4 that the provisions of the section do not apply to Scotland. In New Brunswick and Nova Scotia the amount mentioned in sub.-s. 1 is $40, as in Ontario, whereas in Prince Edward Island it is $30, and in Alberta, British Columbia, Manitoba, Saskatchewan, and the Territories it is $50.

Action is defined as including counterclaim and set-off (chapter 9).

The section applies only to a contract for the sale of goods, that is "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration" (see chapter 1, § 11). Goods are defined as including all chattels personal other than things in action and money, and including emblements, industrial growing crops, and things attached to and forming part of the land which are agreed to be severed before sale or under the contract of sale.

In the Statute of Frauds the expression used was "goods, wares, and merchandises." See chapter 1, § 14.

In the United States, things in action are likewise excluded by the definition of "goods" for the general purposes of the statute, but are included for the purpose of the Statute of

Frauds, and the provision of the Uniform Sales Act (s. 4) which corresponds with the section now under consideration begins with the words "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards, shall not be enforceable by action, unless," etc. Cf. Humble v. Mitchell, 1839, 11 A. & E. 205, 23 R.C. 207, and American notes at pp. 211-12.

The section of the Sale of Goods Act applies to an executory contract to sell (as is made clear by sub.-s. 2, which re-enacts in effect s. 7 of Lord Tenterden's Act quoted in § 23), notwithstanding that the goods "may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." The statute does not, however, apply to a contract for work and labour.

In the United States the statutory provision last quoted is qualified as follows (Uniform Sales Act, s. 4): "but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply." This qualification is intended to reproduce the rule laid down by Shaw C.J., in Mixer v. Howarth, 1838, 21 Pick. (38 Mass.) 205, and by Ames J., in Goddard v. Binney, 1874, 115 Mass. 450. See also the American notes to Lee v. Griffin, 23 R.C. at pp. 196-7.

In Lee v. Griffin, 1861, 1 B. & S. 272, 23 R.C. 191, it was held that where a dentist made two sets of false teeth upon the oral order of A, and A died before the teeth could be fitted, no action would lie against A's executor, the contract being one for the sale of goods. Blackburn J said:

> It is clear that there was no sufficient memorandum of the contract within the Statute of Frauds. The other question is, whether the present was a contract for the sale of goods, or for work and labour. In order to ascertain this you must of course, in each case, look at the contract itself. If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not

accepting. But if the work and labour be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labour is the proper remedy. An attorney employed to draw a deed is a familiar example of the latter proposition; and it would be an abuse of language to say that the paper or parchment of the deed were goods sold and delivered. . . Here if the teeth had been delivered and accepted, the contract for the sale of a chattel would have been complete. I do not think that the relative value of the labour and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been none the less for the sale of a chattel.

The following are some of the cases:

Clay v. Yates, 1856, 1 H. & N. 73 (printing book for author: work and labour).

Wolfenden v. Wilson, 1873, 33 U.C.R. 442 (tombstone: sale).

Isaacs v. Hardy, 1884, Cab. & El. 287 (picture: sale).

Canada Bank Note Co. v. Toronto Ry Co., 1895, 22 O. A.R. 462 (printing debentures in special form on paper supplied by printer: sale).

Allis v. Walker, 1910, 21 Man. R. 770 (engine to be installed on premises: work and materials).

See also Benjamin, Sale, 5th ed., 1906, pp. 151 ff.; Willis, Sale of Goods, pp. 64-66; article in 1 L.Q.R. 9 (January, 1885) by Stephen and Pollock.

§ 25. Alterations in language.

A comparison of the Sale of Goods Act with s. 17 of the Statute of Frauds discloses the following differences of wording:

(a) The word "goods" has replaced the words "goods, wares, and merchandises." As to the definition of goods in the Sale of Goods Act (Ont. s. 2; U. K. s. 62), see chapter 1, § 14.

(b) The word "value" has replaced the word "price." The former word had been used in Lord Tenterden's Act and it had been held that the effect of reading Lord Tenterden's Act and s. 17 of the Statute of Frauds together was that s. 17 must be construed as if it had used the word "value." See § 23.

(c) The words "a contract . . . shall not be enforceable by action" have replaced the words "no contract . . . shall be allowed to be good." See notes below. In the Sale of Goods Act (Ont. s. 2; U. K. s. 62), "action" includes counterclaim and set off.

(d) The word "contract" has replaced the word "bargain." Since the passing of Lord Tenterden's Act the argument formerly based upon the use of the word "bargain" in s. 17 of the Statute of Frauds was no longer tenable. See § 23.

(e) The words "party to be charged or his agent in that behalf" have replaced the words "parties to be charged . . . or their agents thereunto lawfully authorized." It had been held that the note or memorandum need not be signed by both parties to the contract, but that only the party to be charged need sign. Reuss v. Picksley, 1866, L. R. 1 Ex. 342.

The view that the words "no contract . . . shall be allowed to be good" in s. 17 of the Statute of Frauds are the equivalent of "a contract . . . shall not be enforceable by action" in the Sale of Goods Act, and that consequently the Sale of Goods Act has made no change in the law in this respect, is the prevalent view. Maddison v. Alderson, 1 App. Cas. 467, at p. 488. The contrary view is vigorously maintained by Willis (Sale of Goods, pp. 67 ff.). See also Lord Finlay's judgment in Morris v. Baron, [1918] A.C. 1, at p. 11.

In Morris v. Baron the House of Lords held that a contract for the sale of goods of more than £10 value, evidenced in writing as required by the Sale of Goods Act, might be rescinded by a subsequent oral contract for the sale of goods, if there was a clear intention to rescind as distinguished from an intention to vary, notwithstanding that the subsequent contract was itself unenforceable by reason of its non-compliance with the statute. As to oral variation of a written contract or oral waiver of condition, see also Malouglney v. Crowe,

1912, 26 O.L.R. 579, 6 D.L.R. 471; Sierichs v. Hughes, 1918, 42 O.L.R. 608, 43 D.L.R. 297; Hartley v. Hymans, [1920] 3 K.B. 475, at pp. 486 ff.

The defence that the statute has not been complied with must be specially pleaded.

Brutton v. Branson [1898] 2 Q.B. 219; as to terms where the defendant is allowed to amend at the trial, see Vipond v. Sisco, 1913, 29 O.L.R. 200, 14 D.L.R. 129.

§ 26. Acceptance and Receipt.

Sub.-s. 3, defining acceptance for the purpose of the section, adopts the language of Bowen L.J. in Page v. Morgan, 1885, 15 Q.B.D. 228, at p. 233. In this case there was a sale of wheat by sample. The buyer, having received a number of sacks of wheat delivered under the contract at his premises, opened the sacks and examined their contents to see if they were equal to sample, but immediately after doing so gave notice to the seller that he refused the wheat as not being equal to sample. Clearly there was no acceptance which would preclude the buyer from refusing the goods as not being in accordance with the contract, but it was held that there was an act done by the buyer in relation to the goods which recognised the existence of a contract for the purchase of the goods by him, and therefore such acceptance as, joined with the actual receipt of the goods by him, would preclude him from relying upon the Statute of Frauds as a defence. Inasmuch as a later section of the Sale of Goods Act (s. 35) enacts what shall be sufficient acceptance to preclude a buyer from refusing goods as not being in accordance with the contract, it is necessary in the statute to define acceptance for the purposes of the Statute of Frauds. Since the passing of the statute, the statutory definition of acceptance has been applied in circumstances similar to those existing in Page v. Morgan.

Abbott v. Wolsey, [1895] 2 Q.B. 97; Taylor v. Great Eastern Railway, [1901] 1 K.B. 774; Thames Canning Co. v. Eckardt, 1915, 34 O.L.R. 72, 23 D.L.R. 805; cf. McLean v. McGhee, 1920, 30 Man. R. 386, 53 D.L.R. 14 (assumption of ownership).

A different definition of acceptance for the purpose of the Statute of Frauds has been adopted in the United States by the Uniform Sales Act (s. 4),

> There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

This is said to represent the American rule, as well as the early English view, and is substantially in accordance with the view expressed in Willis, Sale of Goods, pp. 78 ff., 88 ff.

An actual receipt of the goods by the buyer takes place when there is a delivery of the goods to or into the control of the buyer so as to divest the seller's lien in respect thereof. Where the seller agrees to hold the goods as the buyer's bailee, some doubt may exist how far the Sale of Goods Act, which preserves the lien in such case (see chapter 7, § 73), has modified the law as to actual receipt. Where, at the time of the attornment, no right of lien exists, the attornment seems to amount to an actual receipt, for the fact that the lien may afterwards revive is immaterial; but where there is a lien at the time, the case seems to be doubtful.

> 25 Halsbury, Laws of England, p. 132, and note (n) where many cases are cited; cf. Willis, Sale of Goods, pp. 92 ff.; as to constructive delivery , see Dublin City Distillery v. Doherty, [1914] A. C. 823, at pp. 844 ff.

Where the goods are, at the time of the contract, in the possession of the buyer as the seller's bailee, the acts of the buyer which constitute an acceptance of the goods also constitute an actual receipt thereof. A delivery of the goods to a carrier, or other agent for the transmission of the goods to the buyer, is an actual receipt of the goods by the buyer by his agent, if the goods are in accordance with the contract and if the seller has not reserved the right of disposal; but such a delivery is not an acceptance of the goods by the buyer, the carrier or other agent not being the buyer's agent for acceptance.

> 25 Halsbury, Laws of England, pp. 132-3; cf. Bushel v. Wheeler, 1844, 15 Q.B. 442 n., 23 R.C. 213; Meredith v. Meigh, 1853, 2 E & B. 364, 23 R.C. 217; as to reservation of the right of disposal, see chapter 3, § 34.

§ 27. Earnest or part payment.

In order to render enforceable a contract within the Sale of Goods Act (Ont. s. 6; U. K. s. 4: § 24), it is sufficient that the buyer gives something in earnest to bind the contract or in part payment.

The giving of earnest, however common in ancient times, has fallen so much into disuse, that the two expressions in this clause of the Statute of Frauds, "give something in earnest," or "in part payment," are often treated as meaning the same thing, although the language clearly intimates that the earnest is "something to bind the bargain," (or the contract), whereas it is manifest that there can be no part payment till after the bargain has been bound, or closed. Earnest may be money, or some gift or token (among the Romans usually a ring), given by the buyer to the seller, and accepted by the latter to mark the final conclusive assent of both sides to the bargain; and this was formerly a prevalent custom in England. And an earnest did not lose its character because the same thing might also avail as a part payment.

Benjamin, Sale, 5th ed., 1906, p. 224; see also Howe v. Smith, 1884, 27 Ch. D. 89; March v. Banton, 1911, 45 Can. S.C.R. 338; Brown v. Walsh, 1919, 45 O.L.R. 646.

A part payment, in order to satisfy the statute, must be accepted by the seller. The acceptance need not, however, be unqualified, provided it is of such a nature that it affords some recognition of the contract on the buyer's part.

Parker v. Crisp & Co., [1919] 1 K.B. 481.

Where, upon an oral contract for the supply of goods, it was a term of the contract that a sum of money which had been overpaid to the seller upon a previous sale should be retained by the seller on account of the price of the goods contracted to be supplied, it was held that there was not a part payment which would satisfy the Sale of Goods Act. To hold otherwise would be to allow the statute to be satisfied by an oral contract without anything further being done to evidence the existence of the contract.

Norton v. Davison, [1899] 1 Q.B. 401, following Walker v. Nussey, 1847, 16 M. & W. 302.

§ 28. Note or memorandum in writing.

In order to render enforceable a contract within the Sale of Goods Act (Ont. s. 6; U. K. s. 4: see § 24), it is sufficient that some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

Questions as to the sufficiency of the note or memorandum and of the signature of the defendant or his agent and as to the agent's authority may arise under s. 4 of the Statute of Frauds as well as under the Sale of Goods Act (s. 17 of the Statute of Frauds). The decisions on these questions are so numerous that no attempt can be made here to do more than refer to some of the recent cases. The earlier English cases are collected in 25 Halsbury, Laws of England, pp. 134 ff., and Benjamin, Sale, 5th ed., 1906, pp. 230 ff.; cf. Chalmers, Sale of Goods, 7th ed., 1910, pp. 23-4; Willis, Sale of Goods, 98 ff.; Wain v. Warlters, 1804, 5 East 10, 6 R.C. 230; Laythoarp v. Bryant, 1836, 2 Bing. N.C. 735, 23 R.C. 239, and notes in 6 R.C. at pp. 249 ff.; Caton v. Caton, 1867, L.R. 2 H.L. 127, 6 R. C. 255; Jones v. Victoria Graving Dock Co., 1877, 2 Q.B.D. 314, 6 R.C. 272; Smith v. Surman, 1829, 9 B. & C. 561, 23 R. C. 230.

As to the contents and nature of the note or memorandum, see the following more recent cases:

Dewar v. Mintoft, [1912] 2 K.B. 373 (parties named but not described as seller and buyer; identification of document referred to).

Lovesy v. Palmer, [1916] 2 Ch. 233 (principal not named or described).

North v. Loomis, [1919] 1 Ch. 378 (omission of unimportant stipulation waived by plaintiff).

Auerbach v. Nelson, [1919] 2 Ch. 383 (identification of subject matter).

Stokes v. Whicher, [1920] 1 Ch. 411 (reading documents together).

Keen v. Mear, [1920] 2 Ch. 574 (only one of two vendors mentioned).

Standard Realty Co. v. Nicholson, 1911, 24 O.L.R. 46 (contract in name of agent).

Bailey v. Dawson, 1912, 25 O.L.R. 387, 1 D.L.R. 487 (reading documents together).

Maybury v. O'Brien, 1911, 25 O.L.R. 229 (reading documents together; contents of writing), reversed, 1912, 26 O.L.R. 628, 6 D.L.R. 268, on other grounds.

Thomson v. Playfair, 1912, 26 O.L.R. 624, 6 D.L.R. 263 (receipt and copy of receipt).

Doran v. McKinnon, 1916, 53 Can. S.C.R. 609, 31 D.L.R. 307, affirming 35 O.L.R. 349, 26 D.L.R. 488 (reading documents together).

Bennett v. Stodgell, 1916, 36 O.L.R. 45, 28 D.L.R. 639 (vendor not named).

Sparks v. Clement, 1917, 41 O.L.R. 344 (identification of subject-matter).

Campbell v. Mahler, 1918, 43 O.L.R. 395, affirmed, 1919, 45 O.L.R. 44, 47 D.L.R. 722 (omission of time of payment); cf. House v. Brown, 1907, 14 O.L.R. 500 (time for payment not agreed upon).

Meighen v. Couch, 1913, 23 Man. R. 117, 9 D.L.R. 829 (terms sufficiently expressed in letters).

Pearson v. O'Brien, 1912, 22 Man. R. 175, 4 D.L.R. 413 (omission of some terms).

Conley v. Paterson, 1912, 22 Man. R. 127, 2 D.L.R. 94 (reference to future formal contract; "agents for the owner").

Selkirk Land & Investment Co. v. Robinson, 1913, 23 Man. R. 774, 13 D.L.R. 936 (reading documents together; principal not named).

McInnis Farms v. McKenzie, 1913, 23 Man. R. 120, 12 D.L.R. 100 (omission of terms).

Pulford v. Loyal Order of Moose, 1913, 23 Man. R. 641, 14 D.L.R. 577 (contract in name of agent).

As to the signature to the note or memorandum or the authority of the agent, see the fololwing cases:

Daniel v. Trefusis, [1914] 1 Ch. 788 (agent authorized to sign document for another purpose).

North v. Loomis, [1919] 1 Ch. 378 (solicitor authorized to complete contract).

Thirkell v. Cambi, [1919] 2 K. B. 590 (solicitor instructed to deny contract).

Grindell v. Bass, [1920] 2 Ch. 487 (defence signed by counsel).

Keen v. Mear, [1920] 2 Ch. 574 (estate agent; partner).

Standard Realty Co. v. Nicholson, 1911, 24 O.L.R. 46 (authority of agent).

Maybury v. O'Brien, 1912, 26 O.L.R. 628, 6 D.L.R. 268 (authority of agent).

McInnis Farms v. McKenzie, 1913, 23 Man. R. 120, 12 D.L.R. 100 (signature of one of two personal representatives).

A letter signed by the party to be charged or his agent in that behalf, and referring to other letters as containing the terms of a contract, may be a sufficient note or memorandum in writing, although it repudiates liability on the contract; but if, while referring to other letters, it refuses to admit that they contain the terms of the contract, it is not a sufficient note or memorandum.

Thirkell v. Cambi, [1919] 2 K. B. 590, distinguishing Bailey v. Sweeting, 1861, 9 C.B.N.S. 843; Wilkinson v. Evans, 1866, L.R. 1 C.P. 407; Buxton v. Rust, 1871, L.R. 7 Ex. 1, 279.

See also the following cases:

Dewar v. Mintoft, [1912] 2 K.B. 373 (repudiation on ground that writer not liable).

Campbell v. Mahler, 1918, 43 O.L.R. 395, affirmed, 1919, 45 O.L.R. 44, 47 D.L.R. 722 (repudiation on ground of misunderstanding).

Martin v. Haubner, 1896, 26 Can. S.C.R. 142 (letter admitting contract by agent, but denying agent's authority), followed in Petrie v. Rae, 1919, 46 O.L.R. 19.

CHAPTER III.

TRANSFER OF THE PROPERTY AS BETWEEN SELLER AND BUYER.

§ 31. Sale and agreement to sell.

The distinction between a sale and an agreement to sell is drawn in the provisions of the Sale of Goods Act already quoted (Ont. s. 33; U.K. s. 1), as follows:

> 3.—(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the tranfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

The Sale of Goods Act (Ont. s. 2; U. K. s. 62) also contains the following provisions:

> "Contract of sale" shall include an agreement to sell as well as a sale.
>
> "Sale" shall include a bargain and sale as well as a sale and delivery.

The distinction between an agreement to sell and a sale is fundamental. The former is a contract pure and simple. At the time of the contract the property in the goods does not pass, but the buyer acquires a right *in personam* to the transfer of the property upon the happening of an event or the ful-

filment of a condition. A sale on the other hand is more than a contract. Its effect is to transfer to the buyer forthwith a right *in rem* — the property in the goods. Under an agreement to sell the seller remains the owner until the agreement to sell becomes a sale, under a sale the buyer becomes the owner forthwith. An agreement to sell and a sale are sometimes referred to as an executory contract of sale and an executed contract of sale respectively.

As to a bargain and sale as distinguished from a sale and delivery, see § 32, and chapter 8, § 81.

§ 32. Property and possession.

The Sale of Goods Act (Ont. s. 2; U. K. s. 62) provides:

> "Property" shall mean the general property in goods, and not merely a special property. "Delivery" shall mean voluntary transfer of possession from one person to another. "Sale" shall include a bargain and sale as well as a sale and delivery.

A gift of a chattel *inter vivos,* if not made by deed, is not complete until delivery, the change of possession being an essential part of the act of giving, though the delivery may precede, instead of accompanying or following, the words of gift.

Cochrane v. Moore, 1890, 25 Q.B.D. 57, explained in In re Stoneham, [1919] 1 Ch. 149.

A contract to pledge a specific chattel, even though money be advanced on the faith of it, is not in itself sufficient to pass any special property in the chattel to the pledgee. Delivery is, in addition, necessary to complete the pledge, but it is enough if the delivery be constructive, or symbolical, instead of actual.

Dublin City Distillery v. Doherty, [1914] A.C. 823, at p. 843.

On the other hand delivery is not essential to a sale. By the law of England, which differs in this respect from the civil law and those laws founded upon it, including the Scottish law, a bargain and sale, a contract for valuable consideration, by which it is agreed that the property in a specific chattel shall pass, is effectual to transfer the property without delivery.

Seath v. Moore, 1885, 11 App. Cas. 350, at pp. 370, 382-3, 23 R.C. 262, at pp. 277, 289; as to bargain and sale

as distinguished from sale and delivery prior to the Judicature Act, see chapter 8, § 81.

By the property in goods is meant the ownership or general property, "the" property—as distinguished from "a" property, that is, merely a special property which one person may have in another person's goods. The owner of goods may transfer a special property (for instance, to a pledgee) and retain the general property. The general property may be transferred subject to a special property (as in a sale by a pledgor subject to the pledgee's rights). The general property ordinarily includes the right to possession, but the right to possession and the property may be separated. The property may be transferred and the possession retained by virtue of the unpaid seller's lien.

See 25 Halsbury, Laws of England, p. 120, note (r); Burdick v. Sewell, 1884, 10 App. Cas. 74, at pp. 92-3, 103, 4 R.C. 758, at pp. 775-6, 785; Attenborough v. Solomon, [1913] A.C. 76, at p. 84; The Parchim, [1918] A.C. 157, at p. 160.

It may be important on various grounds to ascertain precisely when the property passes. (1) As has been pointed out in chapter 1, the goods are usually at the risk of the owner. (2) The rights of the parties against the goods depend upon whether the property is vested in the buyer or in the seller. See chapter 7. (3) The nature of the personal actions of the parties for breach of contract depends to some extent on whether the property has passed. See chapter 8. (4) In case of the insolvency of one of the parties, the difference between a personal action against him and the right to the goods in specie may be of the utmost consequence. See Reid v. Macbeth and Gray, [1904] A.C. 223. (5) Until the property passes to the buyer, he can have only an equitable title which may be postponed to the legal claim of some third party acquired for value and in good faith. Joseph v. Lyons, 1885, 15 Q.B.D. 280; Coyne v. Lee, 1887, 14 O.A.R. 503; but in Ontario an agreement for the pledge of future goods is now within the Bills of Sale and Chattel Mortgage Act: see chapter 4, § 44.

§ 33. Specific or ascertained goods.

The Sale of Goods Act (Ont. s. 2; U. K. s. 62) provides:

"Specific goods" shall mean goods identified and agreed upon at the time the contract of sale is made.

The statute contains no definition of "ascertained goods" but it has been said that the expression means that the individuality of the goods must in some way be arrived at. See Thames Sack and Bag Co. v. Knowles, [1918] W.N. 176, 119 L.T. 287.

In the case of specific or ascertained goods which are the subject of a contract of sale and which are owned by the seller at the time of the contract, the parties may intend any one of several things. (1) They may intend to effect a present transfer of the property in the goods (a) without present transfer of possession, the seller retaining a special property in the goods by virtue of his lien for the price, or (b) together with present transfer of possession. (2) They may intend that the property in the goods shall be transferred at some future time (a) with present transfer of possession, or (b) with future transfer of possession.

The Sale of Goods Act (Ont. s. 19; U.K. s. 17) provides:

19.—(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

§ 34. Rules for ascertaining intention.

In the case of specific goods owned by the seller at time of the contract

If the intention of the parties is clearly expressed, *cadit quaestio*. Frequently, however, the parties fail to express their intention (not uncommonly because they have no definite intention, not having thought of the question of the passing of the property). The courts have therefore been obliged to formulate certain rules of construction (now stated in the Sale of Goods Act) for deciding the intention of the parties on this subject in cases where the parties have failed to ex-

press their intention. If the goods are specific and nothing remains to be done to the goods by the seller in order to put them into a deliverable state or to ascertain the price, the presumption is that the parties intend to effect a present sale, but in different circumstances the presumption may be that the parties intend to suspend the passing of the property. In any event a mere presumption of the intention of the parties must give way to the actual intention, if that intention can be gathered from the contract or conduct of the parties.

Cf. Benjamin, Sale, 5th ed. 1906, pp. 310 ff.

The Sale of Goods Act (Ont. s. 20; U. K. S. 18) provides:

20. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

(a) Rule 1.—Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both be postponed.

(b) Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

(c) Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

The Sale of Goods Act (Ont. s. 2; U. K. s. 62) also provides:

2.—(4) Goods shall be deemed to be in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

Examples of the application of rule 1:

Tarling v. Baxter, 1827, 6 B. & C. 360, 23 R.C. 257 (delivery and payment postponed).

Craig v. Beardmore, 1904, 7 O.L.R. 674 (goods to be delivered at railway siding but destroyed in woods before delivery: delay in delivery possibly due to buyer's fault).

McGregor v. Whalen, 1914, 31 O.L.R. 543, 20 D.L.R. 489 (goods in deliverable state: nothing further to be done by seller).

Lea v. Tangye, 1919 (Alta.), 49 D.L.R. 52 (buyer not to use straw until payment).

The rule does not apply if by the terms of the contract the sale is not to take place until the goods are received and paid for.

Rex v. Chappus, 1920, 48 O.L.R. 189, 55 D.L.R. 77.

Examples of the application of rule 2:

Rugg v. Minett, 1809, 11 East 210, 23 R.C. 295 (casks to be filled by seller).

Acraman v. Morrice, 1849, 8 C.B. 449 (parts of trunks of trees agreed to be sold, but destroyed before severance).

Anderson v. Morice, 1876, 1 App. Cas. 713, L.R. 10 C.P. 609, 23 R.C. 302 (goods to be loaded on ship).

Seath v. Moore, 1886, 11 App. Cas.. 350, at p. 370, 23 R.C. 257, at pp. 277-8.

Boehner v. Smith, 1916, 49 N.S.R. 435, 26 D.L.R. 511 (logs to be safely boomed).

McDill v. Hilson, 1920, 30 Man. R. 454, 53 D.L.R. 228 (furniture to be polished).

The words "and the buyer has notice thereof" in rule 2 are borrowed from the Scottish law and in the United States have been omitted from the corresponding provision of the Uniform Sales Act.

Even though something remains to be done to the goods by the seller to put them into a deliverable state, the property will pass at the time of the contract if such is the intention of the parties

Young v. Matthews, 1866, L.R. 2 C.P. 127.

Examples of the application of rule 3.

Hanson v. Meyer, 1805, 6 East 614 (goods to be weighed).

Logan v. Le Mesurier, 1847, 6 Moo. P.C.C. 116 (goods to be measured).

In the following cases the principle of rule three did not apply because there was nothing to be done by the seller, although the buyer had the right to measure, etc.:

Furley (or Turley) v. Bates, 1863, 2 H. & C. 200.

Gilmour v. Supple, 1858, 11 Moo. P.C.C. 551.

The words "and the buyer has notice thereof" in rule 3 are borrowed from the Scottish law. In the United States the whole rule is omitted from the Uniform Sales Act.

In any case the rule is inapplicable if it appears to have been the intention of the parties that the property should pass.

Wilson v. Shaver, 1901, 3 O.L.R. 110 (subsequent measuring and stamping).

White v. Greer, 1916, 36 O.L.R. 306, 30 D.L.R. 70 (goods inspected, measured and branded).

§ 35. Suspensive and resolutive conditions.

Cases falling within rules 2 and 3 are examples of contracts of sale subject to a condition precedent, or, to use the more expressive term of the civil law, subject to a suspensive condition—the passing of the property being suspended until the performance of the condition. Other examples are afforded by sale, or rather delivery, on trial or on approval, and by the bargain known as "sale or return."

The Sale of Goods Act (Ont. s. 20; U. K. s. 18) provides:

20. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

(d) Rule 4.—When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer:

(i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(ii) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Illustrations of delivery on approval or "on sale or return" or other similar terms may be found in the following cases:

Moss v. Sweet, 1851, 16 Q.B. 493.

Elphick v. Barnes, 1880, 5 C.P.D. 321.

Kirkham v. Attenborough, [1897] 1 Q.B. 201, distinguished in Weiner v. Gill, [1906] 2 K.B. 574; cf. Weiner v. Harris, [1910] 1 K.B. 285.

Canadian Oil Companies v. Margeson, 1917, 51 N.S.R. 331, 35 D.L.R. 298 (option to buy drums in which gasoline delivered).

The person called the "buyer" in the statute is really only a bailee, as he has not bought or agreed to buy, but has merely an option to buy. The position of the seller is that he has made an irrevocable offer to sell.

Helby v. Matthews, [1895] A. C. 471; Kirkham v. Attenborough, [1897] 1 Q.B. 201, at p. 203; 25 Halsbury, Laws of England, p. 178, note (n).

The Sale of Goods Act does not mention, nor does it exclude, the alternative that the parties, instead of intending that the goods shall be sold or delivered on a suspensive condition, may intend that there shall be a present sale with an option on the buyer's part to return the goods within a certain time or in certain circumstances. The effect of this latter transaction is that the property passes at once, subject to be divested in a certain event, that is, the transaction is a sale subject to a condition subsequent, or, to use the term of the civil law, subject to a resolutive condition.

Illustrations of sale upon resolutive condition may be found in the following cases:

Head v. Tattersall, 1871, L.R. 7 Exch. 7 (right to return if condition not fulfilled).

May v. Conn, 1911, 23 O.L.R. 102 (right to return in case of breach of warranty), following Taylor v. Tillotson, 1836, 16 Wend. (N.Y.) 494.

In the United States the words "sale or return" indicate a sale on resolutive condition, and the Uniform Sales Act (s. 19) specifically provides:

> When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

§ 36. Unascertained and future goods.

As contrasted with specific or ascertained goods (Sale of Goods Act: Ont. ss. 2, 19, 51; U. K. ss. 62, 17, 52), the subject of the contract of sale may be unascertained or merely described generically.

As contrasted with existing goods owned by the seller, the subject of the contract may be future goods, that is, goods to be manufactured or acquired by the seller after the making of the contract (Ont. s. 7; U.K. ss. 62, 5).

Whereas in the case of specific goods existing at the time of the contract and owned by the seller, the parties may intend to effect either a present sale or an agreement to sell at a future time, the former of these two alternatives is excluded in the case of future goods and in the case of other unascertained goods.

The Sale of Goods Act (Ont. ss. 7, 18; U. K. ss. 5, 16) provides:

> 7.—(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.
>
> 18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

In the United States the corresponding provisions of the Uniform Sales Act are as follows:

5.—(3) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

17. Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

6.—(1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2) In the case of fungible goods [that is, goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit: s. 76], there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

Referring to s. 6, the Commissioners on Uniform State Laws (Proceedings, 1906, p. 144) say:

> These provisions are new, and 6 (2), at least, probably does not express the English law. It expresses the doctrine of Kimberley v. Patchin, 1859, 19 N.Y. 330, which is supported by the weight of recent American authority, though there are adverse decisions. . . . It is to be noticed that it is provided only that title *may* pass under the suggested circumstances. The presumption would in most cases be that it did not pass because not intended to pass until separation.

See also White v. Wilks, 1813, 5 Taunt 176, 23 R.C. 252, American notes at pp. 255 ff.; and Benjamin, Sale, 5th ed. 1906, p. 338, where it is said that the American cases are in hopeless conflict.

The English rule is that if the parties have not agreed on specific goods as the subject of the contract, and *a fortiori* if the contract relates to goods which are not yet in existence, no property in any particular goods can pass, and the contract must be a mere agreement to sell, not a present sale. It can make no difference that the goods are so far ascertained that the parties are agreed that they shall be taken from a specific larger bulk, if the identity of the portion so to be taken is unascertained.

Benjamin, Sale, 5th ed. 1906, pp. 334 ff.; 25 Halsbury, Laws of England, p. 167; White v. Wilks, *supra*; Busk v. Davis, 1814, 2 M. & S. 397; Pletts v. Campbell, [1895] 2 Q.B. 229; Healey v. Howlett, [1917] 1 K.B. 337; Ross v. Hurteau, 1890, 18 Can. S.C.R. 713; Kidd v. Docherty, 1914, 7 S.L.R. 137, 16 D.L.R. 525; Zaiser v. Jesske, 1918, 11 Sask. L.R. 462, 43 D.L.R. 223. To the contrary is the opinion expressed in Inglis v. Richardson & Sons, 1913, 29 O.L.R. 229, 14 D.L.R. 137, that there may be a present sale of an undivided part of a larger bulk. Benjamin, (Sale, 5th ed. 1906, p. 338) is in this case incorrectly quoted as saying that the cases in England are in conflict.

The parties may agree that so soon as the goods are ascertained the property in them shall pass to the buyer, or even that the property in goods to be manfactured by the seller shall pass in an unfinished state at any stage before the completion of the manufacture.

Seath v. Moore, 1886, 11 App. Cas. 350, at pp. 370, 380, 381, 23 R.C. 257, at pp. 278, 287, 288; Laing v. Barclay, [1908] A.C. 35, at p. 43.

§ 37. Appropriation of goods to the contract.

In other cases the fact that the future goods have been acquired or manufactured by the seller, or that other unascertained goods have become ascertained, as the case may be, may do no more than make it possible for the property to pass.

It is then usually necessary to find some evidence of the intention of the parties as to the time at which the property is to pass, as, for instance, (1) the happening of a specified event which identifies the goods, and on the happening of which it is agreed that the property shall pass, or (2) the unconditional appropriation of the goods, subsequently to the contract and as the subject matter thereof, with the assent of both parties.

Cf. 25 Halsbury, Laws of England, pp. 167 ff., where the subject is worked out in detail.

The rule as to the appropriation of the goods to the contract is stated in the Sale of Goods Act (Ont. s. 20; U. K. s. 18) as follows:

> 20. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> (e) Rule 5.—(i) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.
>
> (ii) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not), for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

"Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it."

Mirabita v. Imperial Ottoman Bank, 1878, 3 Ex. D. 164, at p. 172; cf. Pignataro v. Gilroy, [1919] 1 K.B. 459 (assent of buyer implied from failure to reply to notice); Mason & Risch v. Christner, 1918, 44 O.L.R. 146, 46 D.L.R. 710 (no appropriation by seller with consent of buyer), S.C., 1920, 48 O.L.R. 8, 54 D.L.R. 653; Sells v. Thomson, 1914, 19 B.C.R. 400, 17 D.L.R. 737.

An authority to appropriate is presumed where, by the terms of the contract, one party is to do with reference to the goods some act or thing which cannot be done until the goods are appropriated. When the party authorized has determined his election by doing such act or thing, the appropriation is finally made.

25 Halsbury, Laws of England, p. 169, citing Blackburn, Contract of Sale, 1st ed., p. 128, 3rd ed., p. 138; Fragano v. Long, 1825, 4 B. & C. 219 (insuring and despatch of goods by seller upon buyer's instructions).

The delivery of parts of a machine may be a sufficient appropriation to cause the property to pass, notwithstanding that there are supplemental provisions in the contract for the erection of the complete machine by the seller on the buyer's premises.

Pritchett, etc., Co. v. Currie, [1916] 2 Ch. 515.

Where by the terms of a contract for unascertained goods, the seller agrees to deliver the goods at a particular place, and no intention appears in the contract that the property shall pass previously to such delivery, the property does not pass unless and until delivery is made accordingly.

Calcutta and Burmah Steam Navigation Co. v. De Mattos, 1863, 32 L.J.Q.B. 322, at pp. 335, 328.

The reason for the rule is that until delivery the appropriation is not complete, as till then the seller may change his mind. See 25 Halsbury, Laws of England, p. 174, where some familiar examples are given. In the United States a similar rule is stated in the Uniform Sales Act, but is not limited, as it should be, to contracts for unascertained goods.

§ 38. Reservation of the right of disposal.

The rules already stated as to the time at which the property passes from the seller to the buyer are merely guides to

the intention of the parties in the absence of any clear expression of their intention, and those rules apply only "unless a different intention appears" (Ont. s. 20; U. K. s. 18).

The general principle is that if the goods are specific or ascertained, or, in the case of unascertained goods, so soon as they become ascertained, the property passes to the buyer whenever the parties intend that it shall pass. It may of course be expressly provided by the contract that the property shall not pass until certain conditions are fulfilled. Moreover, when the seller appropriates goods to the contract, he may by the terms of the appropriation prevent the property from passing.

The Sale of Goods Act (Ont. s 21; U. K. s. 19) provides:

> 21.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.
>
> (2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.
>
> (3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he unlawfully retains the bill of lading the property in the goods does not pass to him.

The term "right of disposal" is a translation of *jus disponendi*, which is found in the cases with reference only to shipment under bills of lading. The provision contained in sub-s. 1 is not confined to cases of shipment, although the particular instances of reservation of the right of disposal given

in sub-ss. 2 and 3 are so confined. Under sub-s. 3 it is not imperative that the bill of lading should pass through the hands of the seller's agent (Cahn v. Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643), though before the statute this was generally necessary.

Cf. 25 Halsbury, Laws of England, pp. 181 ff.; as to the reservation of the right of disposal, see also Benjamin, Sale, 5th ed., 1906, pp. 375 ff.

In the United States the words "right of possession or property" are substituted in the Uniform Sales Act (s. 20) for "right of disposal" in sub.-s. 1, the word "property" is substituted in sub.- s. 2, and the wording of the various sub-sections is somewhat altered. There is a provision added that

> Where the goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

If, upon an order for unascertained goods to be shipped f.o.b., the seller delivers to the designated common carrier goods which answer the order, and if, in the case of a bill of lading being taken, it is taken in the name of the buyer, the property passes forthwith to the buyer. If, however, the bill of lading is taken in the name of the seller, *prima facie* he retains the disposing power over and the property in the goods. If he endorses the bill of lading and forwards it to the buyer forthwith, the transaction is equivalent to the taking of the bill of lading in the name of the buyer, and the property passes at once, but if the seller endorses the bill of lading in blank or to his agent and forwards it to his agent for delivery to the buyer upon payment for the goods, acceptance of a draft or performance of some other condition, then the goods remain in the control and are the property of the seller, at least until the condition is fulfilled or the buyer offers to fulfil it and demands the bill of lading.

Vipond v. Sisco, 1913, 29 O.L.R. 200, 14 D.L.R. 129, and cases cited; Graham v. Laird, 1909, 20 O.L.R. 11; Turner v. Liverpool Docks, 1851, 6 Exch. 543, 4 R.C. 725; Shepherd v. Harrison, 1871, L.R. 5 H.L. 116, L.R. 4 Q.B.

196, 23 R.C. 349; Ogg v. Shuter, 1875, 1 C.P.D. 47, 4 R.C. 746; Mirabita v. Imperial Ottoman Bank, 1878, 3 Ex. D. 164, at p. 172; Corby v. Williams, 1881, 7 Can. S.C.R. 470.

Although *prima facie* the taking of the bill of lading in the name of the seller prevents the property from passing, it may appear from the contract and the conduct of the parties that it is the intention of the parties that the property shall nevertheless pass.

The Parchim, [1918] A.C. 157; cf. Standard Trust Co. v. Karst, 1914, 7 Sask. L.R. 290, 20 D.L.R. 10

The provisions of the Sale of Goods Act now in question (Ont. s. 21; U.K. s. 19) relate only to the passing of the property as between the seller and the buyer. If under sub.-s. 3 the buyer wrongfully retains the bill of lading, it may be that he can give a good title to a third party who takes the bill of lading in good faith and without notice. Cahn v. Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q.B. 643. In the United States the same principle is expressed in the following words which are added in the Uniform Sales Act (s. 20) to the sub-section corresponding with sub-s. 3:

> If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is endorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading endorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

This question belongs to the subject of the next following chapter. See § 44.

CHAPTER IV.

WHO CAN GIVE A GOOD TITLE.

§ 41. Sale by person without title.

The general rule is that a person who has no title to goods cannot give a title to another person—*nemo dat quod non habet.*

In practice, however, the general rule must be subject to important exceptions, firstly, because the seller, though he may not be the owner, may have the legal right to sell on behalf of the owner, and secondly, because the true owner may be estopped from denying the right of the seller to sell.

The exceptions above mentioned may be further sub-divided as follows:

(1) Sale by a person having legal right to sell:
   (a) Sale by an agent within his authority.
   (b) Sale by a person having a power of sale.
   (c) Sale by a person under an order of a competent court.
(2) Sale the validity of which the owner is estopped from disputing:
   (d) Sale by an ostensible owner.
   (e) Sale by an ostensible agent for sale.

Exceptions (d) and (e) are further discussed below. Exception (a) is not a real exception because a sale made by an agent within his authority is the sale of the principal not that of the agent. Exception (b) is illustrated by the case of a pledgee having an implied or express power of sale. See Donald v. Suckling, 1866, L.R. 1 Q.B. 585, 21 R.C. 301.

The Sale of Goods Act (Ont. s. 23; U.K. s. 21) states the general rule and some of the exceptions as follows:

23. Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. Provided that nothing in this Act shall affect:

(a) The provisions of *The Factors Act* or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

As to sale by the apparent owner, see § 44, and as to the Factors Act, see § 46.

In the United Kingdom the Sale of Goods Act (s. 22) also contains the following provision:

22.—(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

In the Ontario statute the foregoing section is replaced by the following (s. 24):

24. The law relating to market overt shall not apply to any sale of goods which takes place in Ontario.

As to market overt in Ontario prior to the statute, see Forristal v. McDonald, 1883, 9 Can. S.C.R. 12, at p. 16 (Strong J.: "for sale in market overt, is, of course, out of the question"); but cf. Bowman v. Yielding, M.T. 3 V., Ont. Dig. 1900, vol. 3, col. 6203; McNabb v. Howland, 1862, 11 U.C.C.P. 434, at p. 436; Thompson v. Nelles, 1855, 4 U.C.C.P. 399; Peoples Bank of Halifax v. Estey, 1904, 34 Can. S.C.R. 429, at p. 448.

As to sale in market overt in the United Kingdom, see 20 Halsbury, Laws of England, pp. 53 ff., 25 Halsbury, pp. 195-6; Willis, Sale of Goods, 146 ff.; Scattergood v. Sylvester, 1850, 15 Q.B. 506, 16 R.C. 1; Horwood v. Smith, 1788, 2 T.R. 750, 23 R.C. 243.

S. 26 of the original statute has been omitted from the Ontario statute, the subject matter being covered by the following provisions of the Execution Act, R.S.O. 1914, c. 80, s. 10:

> **10.**—(1) Subject to the provisions of *The Land Titles Act*, a writ of execution shall bind the goods and lands against which it is issued from the time of the delivery thereof to the sheriff for execution, but subject to the provisions of *The Bills of Sale and Chattel Mortgage Act* no writ of execution against goods shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration unless such person had, at the time when he acquired his title, notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seised or attached had been delivered to the sheriff and remains in his hands unexecuted.
>
> (2) The sheriff shall, upon the receipt of the writ and without fee, endorse thereon the day of the year, the month, the hour and the minute when the same was received.
>
> (3) Subsection 1 shall not apply to an execution against goods issued out of a division court, which shall bind only from the time of the seizure.

§ 42. Sale by person with a voidable title.

The Sale of Goods Act (Ont. s. 25; U.K. s. 23) provides:

> **25.** When the seller of goods has a voidable title thereto but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defective title.

This section does not form a real exception to the rule that person cannot give a better title than he has himself.

Folkes v. King [1922] 2 K.B. 348
reversed [1923] 1 K.B. 282.

The buyer gets a good title because the seller has a good title at the time of sale, nothing having then been done to avoid the title. The case of a pledge by a person with a voidable title is possibly not within the wording of the section, but the result at common law is the same. For instance, if the owner of goods is induced to deliver them on sale or return by the false representation of the buyer that he has a customer who desires to purchase them, the title passes to the buyer, and a pledgee in good faith and without notice gets a good title, notwithstanding that the original seller may have the right to avoid the transaction as against the buyer.

Whitehorn Brothers v. Davison, [1911] 1 K.B. 463; cf. Laidlaw v. Vaughan-Rhys, 1911, 44 Can. S.C.R. 458, at pp. 467, 468; Willis, Sale of Goods, pp. 148 ff.; for a discussion of the earlier cases, and the principle upon which the third party's title is good, see Ewart, Estoppel, pp. 181-3, 302-4.

A voidable title is to be distinguished from a void title. If goods are obtained by means amounting to theft, the thief has no title and can give none. So, if a contract of sale is procured by fraud of such a nature that it nullifies the consent to the contract, as, for instance, if A delivers goods at B's address under the belief that he is dealing with C, such belief being brought about by the fraud of B, whom A does not know and has not seen, there is no contract between A and B. B, having no title, can give none to a third party.

Cundy v. Lindsay, 1878, 3 App. Cas. 459, 6 R.C. 211.

If, however, B, fraudently assuming the name of C, buys, *in person,* and obtains delivery of, goods from A, the property in the goods passes to B, and he can therefore give a good title to a third party who buys in good faith and without notice before B's title is avoided.

Phillips v. Brooks, [1919] 2 K.B. 243.

In the United Kingdom the Sale of Goods Act (s. 24) provides:

24.—(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the own-

er of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt, or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not vest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

As to the history and meaning of this provision, see Benjamin, Sale, 5th ed. 1906, pp. 19 ff.

A thief cannot by a sale of goods confer a good title upon a third party as against the owner, except in the case of sale in market overt or in the case of a sale in a foreign country by the law of which a sale by a thief is valid. The foregoing provision has been omitted from the Ontario statute as being unnecessary in view of the fact that the doctrine of market overt does not apply to any sale of goods which takes place in Ontario (Ont. s. 24, quoted in § 41). Its retention would only have served to throw doubt upon the general rule that a thief cannot confer a good title. Sub-s. 2 repeats in part the principle stated in another section (Ont. s. 25; U.K. s. 23), that a buyer in good faith and without notice from a person with a merely voidable title may obtain a good title.

§ 43. Transfer of document of title.

In Ontario the Sale of Goods Act (s. 2) provides:

"Document of title" shall include any bill of lading and warehouse receipt, as defined by *The Mercantile Law Amendment Act*, any warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive goods thereby represented.

The foregoing is copied from the Factors Act, R.S.O. 1914, c. 137, s. 2. See § 46.

The Mercantile Law Amendment Act, R.S.O. 1914, c. 133, s. 2, provides:

2. In this Act,

(a) "Bill of lading" shall include all receipts for goods accompanied by an undertaking to transfer the same from the place where they were received to some other place by any mode of carriage whatever, whether by land or water or partly by land and partly by water;

(b) Goods shall include wares and merchandise;

(c) "Warehouse receipt" shall mean any receipt given by any person for goods in his actual, visible and continued possession as bailee thereof in good faith and not as of his own property, and shall include

(i) a receipt given by any person who is the owner or keeper of a harbour, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods delivered to him as bailee, and actually in the place or in one or more of the places owned or kept by him whether such person is engaged in other business or not;

(ii) a receipt given by any person in charge of logs or timber in transit from timber limits or other land to the place of destination of such logs or timber; and

(iii) a specification of timber.

In the United Kingdom the Sale of Goods Act (s. 62) provides that document of title to goods has the same meaning as it has in the Factors Acts, and the Factors Act, 1889, s. 1, provides:

1.—(3) The expression "goods" shall include wares and merchandise. (4) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, any warrant or order for the delivery of goods and any other document used

in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

The Sale of Goods Act (Ont. s. 29; U. K. s. 29) provides:

29.—(3) Where the goods at the time of sale are in the possesion of a third person, there is no delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

As to delivery, see chapter 6, § 62. The sub-section is quoted here on account of the proviso.

The Sale of Goods Act (Ont. s. 46; U.K. s. 47) provides:

46. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Provided that, where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's rights of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

This section is discussed in chapter 7, § 75, in connection with the seller's lien and right of stoppage in transitu. It is quoted here as an example of the effect of the transfer of a document of title.

It is to be observed that in the foregoing statutory definitions bills of lading are grouped with warehouse receipts and other similar receipts under the general name of "documents of title," and that in the other provisions of the Sale of Goods

Act just quoted, as well as in the Factors Act (to be referred to later), all these documents of title are put on the same footing for the purposes mentioned in the statutes. Similarly under the Bank Act (ss. 2, 86, 87), and in Ontario under the Mercantile Law Amendment Act, bills of lading and warehouse receipts are put on the same footing as regards their transfer to a lender by way of collateral security.

At common law, however, the transfer of a warehouse receipt, unlike that of a bill of lading, did not have the effect of transferring the property in the goods to the transferee, at least until the receipt was presented to the bailee and acted upon.

Bank of British North America v. Clarkson, 1869, 19 U.C.C.P. 182, at p. 188; Glass v. Whitney, 1863, 22 U.C.R. 290. As to bills of lading , see Barber v. Meyerstein, 1870, L.R. 4 H.L. 317, 4 R.C. 797; Glyn v. East and West India Dock Co., 1882, 7 App. Cas. 591, and the cases cited in chapter 7, § 75.

In the United Kingdom the Bills of Lading Act, 1855, provides:

> Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value, should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid: Be it therefore enacted . . . . as follows:
>
> **1.** Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be

subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2. Nothing herein contained shall prejudice or affect any right of stoppage *in transitu,* or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same notwithstanding that such goods or some part thereof may not have been shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

In Ontario the foregoing statute is in effect re-enacted (without the preamble), in the Mercantile Law Amendment Act, R.S.O. 1914, c. 133, s.7. Apart from merely verbal differences, s. 3 of the original statute is altered by the insertion of the words "train or conveyance of any kind" after the word "vessel," and by the insertion of the words "or unless the bill of lading has a stipulation to the contrary" immediately before the proviso. See also the Bills of Lading Act, R. S.C. 1906, c. 118, which is substantially the same as the Ontario statute, except that in the section corresponding to s. 2 of the original statute there is a clause safeguarding "any right of an unpaid vendor under the Civil Code of Lower Canada."

As to the Bills of Lading Act, see the following cases:

Grant v. Norway, 1851,10 C.B. 665, 24 R.C. 258, followed in Erb v. Great Western Ry. Co., 1881, 5 Can. S.C.

R. 179 (fraudulent receipt for goods not received), and in Cox v. Bruce, 1886, 18 Q.B.D. 147, 24 R.C. 268 (goods incorrectly described).

Sewell v. Burdick, 1884, 10 App. Cas. 74, 4 R.C. 758 (pledgee not liable for freight).

The Freedom, 1871, L.R. 3 P.C. 394, followed in Friendly v. Canadian Transit Co., 1886, 10 O.R. 756 (right to sue upon contract follows property in goods).

§ 44. Ostensible ownership or agency.

One of the exceptions, mentioned in § 41, to the general rule that a person who has no title to goods cannot confer a title upon a third party, is the case in which the owner is estopped from denying the validity of the sale. Estoppel may arise where the owner has so acted as to clothe another person with apparent or ostensible ownership, or it may arise where the owner has so acted as to clothe another person with apparent or ostensible agency for sale. If the ostensible owner or ostensible agent for sale, as the case may be, purports to sell to a buyer who takes for value in good faith and without notice, the original owner ought on principle to be estopped from disputing the validity of the sale.

At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited. And the possession of

bills of lading or other documents of title did not at common law confer on the holder of them any greater power than the possession of the goods themselves.

Cole v. North Western Bank, 1875, L.R. 10 C.P. 354, at pp. 362-3, Blackburn J.

A, the owner of goods, tells B that he has sold them to C. If B then buys the goods from C in good faith and without notice of the fact that C has not a good title, A is estopped from denying the validity of the sale. "The maxim *nemo plus juris transferre potest quam se ipse habet* has no application where the owner of goods has so lent himself to accredit the title to another person."

Peoples Bank of Halifax v. Estey, 1904, 34 Can. S.C. R. 429, at pp. 434, 438; but see also the dissenting judgment at pp. 447 ff.

Mere possession, apart from special circumstances, does not accredit title, or, in other words, is no evidence of title—usually a man cannot be said to be the ostensible owner of goods merely because he has them in his possession. The character of the goods, the character of the place in which the owner leaves them or to which he sends them, or the customary occupation of the person to whom he entrusts them, may, however, be such as to estop the owner from denying, to a transferee for value, in good faith and without notice, that the person in possession is the owner; or there may be other circumstances which give to the possessor of goods such ostensible ownership as may estop the owner from disputing the validity of a sale made by the person in possession. So if the owner of goods delivers to another a document of title to the goods, he may in certain circumstances be estopped from denying the ownership or right to sell of the holder of the document in the case of a sale by the latter to a purchaser for value in good faith and without notice. The decided cases are, however, frequently far from clear in the application of the principle of estoppel, and the general applicability of the principle has been obscured by the passing from time to time of partial enactments dealing with particular cases of estoppel rather than with the general principle. The provisions of the successive Factors Acts and those of the Sale of Goods

Act have apparently been taken by the courts as being more or less exhaustive declarations of the principle of estoppel, to the exclusion of cases not falling within the letter of the statutes. Thus the courts have directed their efforts rather to the construction of statutes than to the application of the general principle.

See Ewart, Estoppel, pp. 296 ff. (chapters on ostensible ownership and agency: goods—possession—documents of title—legislation).

§ 45. Seller or buyer in possession.

The Sale of Goods Act makes provision in one section (Ont. s. 26; U. K. s. 25) for two different cases of ostensible ownership, namely, that of a person remaining in possession of goods or of the documents of title after having sold the goods (sub-s. 1), and that of a person who having bought or agreed to buy goods obtains possession of the goods or of the documents of title (sub-s. 2). Under either sub-section the general principle is that the ostensible owner, that is, the person who is in possession of goods or documents in the circumstances mentioned, may give a good title to a third party who takes in good faith without notice.

In Ontario the principle of sub-s. 1 is reinforced by the Bills of Sale and Chattel Mortgages Act, and that of sub-s. 2 by the Conditional Sales Act, further mentioned below.

The section of the Sale of Goods Act now in question (Ont. s. 26; U.K. s. 25) provides:

> **26.**—(1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.
>
> (2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession

of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" shall mean a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

The definition of "mercantile agent" is copied from the Factors Act, R.S.O. 1914, c. 137.

In the United Kingdom sub-s. 3 reads as follows:

25.—(3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

The definition of "mercantile agent" in the Factors Act 1889, is the same as that contained in the Ontario Factors Act, set out above.

In the United Kingdom the Factors Act, 1889, contains (in ss. 8 and 9) provisions identical with sub-ss. 1 and 2, with the addition of the words "or under any agreement for sale, pledge or other disposition thereof" after the words "other disposition thereof," in each case. In Ontario the corresponding provisions of the Factors Act have been repealed, as it seemed useless to have similar provisions on the same subject in two different statutes.

The words "having . . . agreed to buy" in sub-s. 2 have been the subject of several decisions. They do not cover the case of a so-called buyer having a mere option to complete the purchase by payment of instalments of the purchase-money, but they do cover the case of a buyer who is under an obligation to complete the purchase.

Helby v. Matthews, [1895] A.C. 471; Belsize Motor Supply Co. v. Cox, [1914] 1 K.B. 244, and cases cited; Marten v. Whale, [1917] 2 K.B. 480.

In fulfilment of a contract for the sale of a certain quantity of copper the sellers forwarded to the buyers a bill of lading endorsed in blank for copper shipped on the defendant's ship, together with a draft for the price of the copper for acceptance. The buyer, who was insolvent, did not accept the draft, and delivered the bill of lading to the plaintiffs in fulfilment of a contract which he had, previously to obtaining possession of the bill of lading, made for the sale to them of copper, and they thereupon paid him the price of the copper. The plaintiffs took the bill of lading in good faith, and without notice of the rights of the original sellers in respect of the copper. The sellers stopped the copper in transitu. In an action by the plaintiffs against the defendant for non-delivery of the copper, it was held that the buyer having obtained possession of the bill of lading with the consent of the sellers, the transfer of it by him to the plaintiffs gave them a good title to the copper under sub-s. 2 of s. 25 [Ont. s. 26] of the Sale of Goods Act, and that the sellers had no right to stop it in transitu.

Cahn v. Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q.B. 643.

In the United States the principle of the decision in Cahn v. Pockett's Bristol Steam Packet Company is expressed in s. 20 of the Uniform Sales Act: see chapter 3, § 38. The Uniform Sales Act, s. 25, is to the same effect as sub-s. 2 of the section of the Sale of Goods Act now under consideration (Ont. s. 26; U.K. s. 25), and also contains the following provision:

> **26.** Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

In Ontario the Sale of Goods Act provides:

> **58.**—(2) Nothing in this Act shall affect enactments relating to conditional sales, bills of sale or chattel mortgages, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

In the United Kingdom the corresponding provision (s. 61, sub-s. 3) omits the references to conditional sales and chattel mortgages.

In Ontario the Conditional Sales Act, R.S.O. 1914, c. 136, provides:

> 3.—(1) Where possession of goods is delivered to a purchaser, or a proposed purchaser or a hirer of them, in pursuance of a contract which provides that the ownership is to remain in the seller or hirer until the payment of the purchase price or consideration money or part of it, as against a subsequent purchaser or mortgagee claiming from or under the purchaser, proposed purchaser or hirer, without notice in good faith and for valuable consideration, such provision shall be invalid, and such purchaser, or proposed purchaser or hirer, shall be deemed the owner of the goods

unless certain conditions are fulfilled, including the existence of a contract in writing, and, in most cases, the filing of a copy of the contract in the proper office within the time limited by the statute.

The Conditional Sales Act does not enlarge the common law rights of those who allow their goods out of their hands, but it prevents all who have not complied with its conditions from asserting certain common law rights.

> Canadian Westinghouse Co. v. Murray Shoe Co., 1914, 31 O.L.R. 11, 20 D.L.R. 672; cf. Stock v. Meyers & Cook, 1919, 46 O.L.R. 420, 51 D.L.R. 328; Commercial Finance Corporation v. Stratford, 1920, 47 O.L.R. 392.

Under the Bills of Sale and Chattel Mortgages Act, R.S.O. 1914, c. 135, if a person remains in possession of goods after having made a bill of sale or a chattel mortgage of them, or after having sold them or agreed to make a sale or mortgage of them, the mortgage or sale or agreement for mortgage or sale is null and void as against creditors of the mortgagor or seller, and against subsequent purchasers or mortgagees in good faith for valuable consideration, unless the mortgage or sale, or agreement for mortgage or sale, is evidenced by a written document, and unless this document, accompanied by certain affidavits prescribed by the statute, is registered in the proper office within the time limited by the statute.

The Bills of Sale and Chattel Mortgages Act further provides:

> **11.** This Act shall extend to a mortgage or sale of goods and chattels which may not be the property of or in the possession, custody or control of the mortgagor or bargainor or any person on his behalf at the time of the making of the mortgage or sale, and notwithstanding that such goods or chattels may be intended to be delivered at some future time, or that the same may not at the time of the making of the mortgage or sale be actually procured or provided or fit or ready for delivery, or that some act may be required for the making or completing of such goods and chattels or rendering the same fit for delivery.

In all the provinces of Canada in which the Sale of Goods Act is in force there are statutes similar to the Conditional Sales Act and the Bills of Sale and Chattel Mortgages Act above mentioned. There exists, however, in these various provincial statutes a bewildering diversity which precludes any attempt to write a commentary on them here.

§ 46. The Factors Acts.

In the case of Pickering v. Busk, 1812, 15 East 38, the buyer of goods caused the goods to be transferred in the books of the warehouseman to the broker through whom he had bought, and the broker sold the goods to a second purchaser for value in good faith and without notice. It was held that the latter obtained a good title, and the general principle of estoppel was stated thus:

> Strangers can only look to the acts of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority.

The broad principle above stated, applicable to cases in which the owner of goods has constituted another person his ostensible agent for sale, has not always been applied consistently by the courts (see § 44), and the various Factors Acts, together with some provisions of the Sale of Goods Act, are only partially successful efforts to state some of the cases in which the owner of goods is estopped because he has clothed another person with ostensible agency for sale or with ostensible ownership.

In the United Kingdom the Factors Act, 1889, (which was, subject to certain exceptions, made applicable to Scotland in 1890) superseded the earlier legislation relating to sales and pledges of goods by persons in possession of the goods or of documents of title to the goods. As to the history of the legislation, see Cole v. North Western Bank, 1875, L.R. 10 C.P. 354; Chalmers, Sale of Goods, 7th ed. 1910, pp. 152, 153; Ewart, Estoppel, pp. 353 ff.; notes in 2 R.C. at pp. 433 ff., to Hollins v. Fowler, 1875, L.R. 7 H.L. 757, 2 R.C. 409.

As has already been noted in the Introduction, § 2, the Factors Act, 1889, has been adopted in Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan.

As to the law in Manitoba, see Stewart v. Richardson, 1920, 30 Man. R. 481.

The following is the text of The Factors Act in Ontario, R.S.O. 1914, c. 137, each section being followed by a note referring to the corresponding section of the original statute:

1. This Act may be cited as *The Factors Act.*

[U. K. s. 17: This Act may be cited as The Factors Act, 1889].

2.—(1) In this Act,—

(a) "Document of title" shall include any bill of lading and warehouse receipt, as defined by *The Mercantile Law Amendment Act,* any warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of

goods, or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive goods thereby represented;

(b) "Goods" shall include wares and merchandise;

(c) "Mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods;

(d) "Pledge" shall include any contract pledging or giving a lien or security on goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability.

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.

[In the United Kingdom the Factors Act, 1889, s. 1, contains similar provisions, but there are verbal differences in the definition of "document of title." See § 43 for the text of the different statutory definitions of document of title, bill of lading and warehouse receipt].

Dispositions by Mercantile Agents.

3.—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time thereof notice that the person making the disposition has not authority to make the same.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of documents of title to goods, any sale, pledge or other disposition which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition acts in good faith and has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4) For the purpose of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

[This section is copied from s. 2 of the Factors Act 1889].

4. A pledge by a mercantile agent of the documents of title to goods shall be deemed to be a pledge of the goods.

[This section is copied from s. 3 of the Factors Act 1889].

5. Where a mercantile agent pledges goods as security for a debt due from or liability incurred by the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

[This section is copied from s. 4 of the Factors Act 1889].

6. The consideration necessary for the validity of a sale, pledge or other disposition of goods by a mercantile agent, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a nego-

tiable security or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security or of other valuable consideration, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, document, security or other valuable consideration when so delivered or transferred in exchange.

[This section is copied from s. 5 of the Factors Act 1889].

7. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

[This section is copied from s. 6 of the Factors Act 1889].

8.—(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made in good faith to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2) Nothing in this section shall limit or affect the validity of any sale, pledge or disposition by a mercantile agent.

[This section is copied from s. 7 of the Factors Act 1889].

Dispositions by Sellers and Buyers of Goods.

[The next following three sections of the Factors Act were repealed in Ontario by the Sale of Goods Act, 1920. As to ss. 9 and 10 of the Ontario Factors Act corresponding with ss. 8 and 9 of the Factors Act, 1889, see now § 44, where the similar provisions of the Sale of Goods Act (Ont.

s. 26; U.K. s. 25) are set out. S. 11 of the Ontario Factors Act related to the effect upon an unpaid seller's lien or retention or stoppage in transitu of a sale or pledge of the goods by the buyer to a third person, and was in the same terms as the provision on this subject now contained in the Sale of Goods Act (Ont. s. 46; U.K. s. 47), discussed in chapter 7, § 75. In the United Kingdom s. 10 of the Factors Act, 1889, relates to the same subject and was not repealed by the Sale of Goods Act, 1893].

Supplemental.

12. For the purposes of this Act the transfer of a document of title may be by endorsement, or where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

[This section is copied from s. 11 of the Factors Act 1889].

13.—(1) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability for so doing.

(2) Nothing in this Act shall prevent the owner of goods from recovering them from his agent at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the document of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of

that price, subject to any right of set off on the part of the buyer against the agent.

[This section is copied from s. 12 of the Factors Act 1889, with some modifications. The latter statute has the words "civil or criminal" after the word "liability" in sub-s. 1, and the words "or his trustee in bankruptcy" after the word "agent" where it first occurs in sub-s. 2].

14. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

[This section is copied from s. 13 of the Factors Act 1889].

§ 47. Negotiable documents in the United States.

There are no provisions of the Sale of Goods Act corresponding with ss. 27 to 40 of the Uniform Sales Act relating to negotiable documents of title. In view of the fact that the Uniform Sales Act has already been adopted in New York and in twenty-two other states (see the Introduction, § 3), the sections in question are set out below as being of some practical importance to Canadian lawyers, whose clients may be engaged in transactions governed by these statutory provisions.

The Uniform Sales Act provides:

76.—(1) In this Act, unless the context or subject matter otherwise requires:

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by endorsement or by delivery, goods represented by such document.

27. A document of the title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

28. A negotiable document of title may be negotiated by delivery—

(a) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

29. A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

30. If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable" "non-negotiable," or the like.

31. A document of title which is not in such form that it can be negotiated by delivery may be transferred by the

holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.

32. A negotiable document of title may be negotiated—

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

[The Commissioners on Uniform State Laws add this note to s. 32:

By this section a negotiable document of title is not given the full negotiability of a bill of exchange, inasmuch as neither a thief nor a finder is within the terms of the section. By the Uniform Bills of Lading Act, however, the Commissioners on Uniform State Laws adopted the principle of full negotiability. In a jurisdiction where it is desired that the Sales Act and the Bills of Lading Act should both be passed and should be in harmony, the following substitute is suggested for section 32 of the Sales Act as above printed:

Sec. 32. A negotiable document may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the document, the bailee issuing it undertakes to deliver the goods to the order of such person, or if at the time of negotiation the document is in such form that it may be negotiated by delivery].

33. A person to whom a negotiable document of title has been duly negotiated acquires thereby;

(a) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had

ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

34. A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

35. Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

36. A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

(a) That the document is genuine;

(b) That he has a legal right to negotiate or transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the document, and

(d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

37. The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfil their respective obligations.

38. The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

39. If the goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

40. A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

CHAPTER V.

REPRESENTATIONS, CONDITIONS AND WARRANTIES.

§ 51. Representations.

A contract of sale may include express or implied terms, distinguished as conditions and warranties. These are statements or promises which are incorporated in the contract, and as to terms of this kind the Sale of Goods Act contains various provisions which will be discussed later.

There may also be a statement made by one party which induces the other party to enter into the contract but which is not made a term of the contract. As to the effect of such a statement the statute makes no provision except that it declares (Ont. s. 58 (1); U.K. s. 61 (2)):

> 58.—(1) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods.

The statute must be regarded as a single chapter in the general law of contract, and therefore it does not attempt to deal with the law of representations, conditions and warranties, in so far as they are governed by considerations common to the whole field of contract.

Chalmers, Sale of Goods, 7th ed. 1910, p. 34.

If a statement of fact, made during the negotiations for a contract of sale or at the time of the making of the contract, is not a mere "flourishing description" of the subject matter or a mere expression of opinion on the seller's part about something upon which the buyer has an opportunity of forming his own opinion, it may be a representation which procures the consent of the other party or it may be a term of the contract, but it will not be treated as a term unless it appears that it was the intention of the parties that it should be a term, and the circumstance that the seller assumes to assert as a fact something of which the buyer is ignorant, though valuable as evidence of intention is not conclusive of the question.

> Heilbut v. Buckleton, [1913] A.C. 30; Gardner v. Merker, 1918, 43 O.L.R. 411, 44 D.L.R. 217; Harrison v. Knowles, [1918] 1 K.B. 608; Smith v. Land and House Property Corporation, 1884, 28 Ch. D. 7, and cases cited in argument.

A statement of fact can be binding upon the person making it only as part of a contract, or by way of estoppel, or as amounting to an actionable wrong. If the statement is of something to be performed in the future it must be a promise binding by way of contract, if binding at all. If a statement of fact is not made a term of the contract, and it turns out to be false, the remedies of the person misled will depend in part on whether the misrepresentation was made fraudulently or innocently. The contract may be rescinded on the ground of misrepresentation, fraudulent or innocent. In order to recover damages for deceit, however, the person who was misled must show that the defendant made a false representation knowingly, or without belief in its truth, or recklessly, careless whether it was true or false, and it is not sufficient that the defendant had no reasonable grounds for his belief, if in fact he made the statement in the honest belief that it was true. On the other hand, an innocent misrepresentation will not itself be a ground for an action for damages, but the person who made the representation may be estopped from denying its truth and may thus be disabled from proving his defence to an action based upon the truth of the representation.

Pollock, Contract, 8th ed. 1911, pp. 556-9; Derry v. Peek, 1889,14 App. Cas. 337; Redgrave v. Hurd, 1881, 20 Ch. D. 1; Newbigging v. Adam, 1886, 34 Ch. D. 582; Anson, Contract, 15th ed. 1920, pp. 191-197; Long v. Smith, 1911, 23 O.L.R. 121; Caldwell v. Cockshutt Plow Co., 1913, 30 O.L.R. 244, 18 D.L.R. 722; Dominion Paper Box Co. v. Crown Tailoring Co., 1918, 42 O.L.R. 249, 43 D.L.R. 557.

As to estoppel see Ewart, Estoppel, chapter 8 (Fraud or bad faith not essential); Low v. Bouverie, [1891] 3 Ch. 82; Balkis Consolidated Co. v. Tompkinson, [1893] A. C. 397.

Whether the misrepresentation be innocent or fraudulent, the contract cannot be rescinded after the position of the parties has been changed so that the former state of things cannot be restored, or after third parties have in good faith and for value acquired proprietary or possessory rights under the contract, or after the injured party has done some act which amounts to an affirmation of the contract. The contract must be rescinded within a reasonable time, that is, before the lapse of a time, after the true state of things is known, so long that in the circumstances of the particular case the other party may fairly infer that the right of rescission is waived.

Pollock, Contract, 8th ed. 1911, pp. 622 ff. cf. Anson, Contract, 15th ed. 1920, pp. 193, 216-7; Addison v. Ottawa Auto and Taxi Co., 1913, 30 O.L.R. 51, 16 D.L.R. 318 (rescission with compensation by buyer for use and deterioration).

As to a third party acquiring a good title from a person with a voidable title, see chapter 4, § 42.

In the case of an executed contract for the sale of a chattel or chose in action, the court will not grant rescission on the ground of innocent misrepresentation. In such a case fraud must be proved in order to entitle the plaintiff to succeed.

Seddon v. North Eastern Salt Co., [1905] 1 Ch. 326, and cases cited; Angel v. Jay, [1911] 1 K.B. 666; cf. Bell v. Macklin, 1887, 15 Can. S.C.R. 576, at p. 581.

In Kennedy v. Panama, etc., Co., 1867, L.R. 2 Q.B.580, at p. 587, Blackburn J., after referring to several cases in each of which a contract had been set aside on the ground that the buyer had not received the thing he had paid for, said:

> There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract.

§ 52. Conditions and Warranties.

A representation which is subsequently made part of the contract ceases to be a representation and becomes something more, viz., a *promise* that such a thing is or shall be.

Anson, Contract, 15th ed., 1920,p. 182.

The question then arises whether this representation, which has ceased to be a mere representation, and has become a term of the contract, is a condition or is a warranty.

A "warranty" is defined in the Sale of Goods Act (Ont. s. 2; U. K. s. 62) as meaning:

> An agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

An earlier definition is that of Lord Abinger in Chanter v. Hopkins, 1838, 4 M. & W. 399, at p. 404:

> A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and, though part of the contract, yet collateral to the express object of it.

A "condition" is not defined in the statute. A condition is a term which is "of the essence" of the contract or, in other words, which is "regarded by the parties as a vital term going to the root of the contract."

Anson, *op. cit.*, pp. 183, 186.

A valuable note as to the terms "condition" and "warranty," with quotations from many sources, is contained in Chalmers, Sale of Goods, 7th ed. 1910, pp. 191 ff.

In Wallis v. Pratt, in a judgment which was approved by the House of Lords, ([1911] A.C. 394), Fletcher Moulton L.J. said ([1910] 2 K.B. 1003, at p. 1012):

> A party to a contract who has performed, or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognized that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating

the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognizing this distinction between the two classes of obligations under a contract there has not been a similar consistency in the nomenclature applied to them. I do not, however, propose to discuss this matter, because later usage has consecrated the term "condition" to describe an obligation of the former class and "warranty" to describe an obligation of the latter class.

The Sale of Goods Act (Ont. s. 13; U.K. s. 11) provides:

> **13.**—(2) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

In Bentsen v. Taylor, [1893] 2 Q.B. 274, at p. 281, Bowen L.J. said:

> Of course it is often very difficult to decide as a matter of construction whether a representation which contains a promise, or which can only be explained on the ground that it is in itself a substantive part of the contract, amounts to a condition precedent, or is only a warranty. There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised— would be likely to affect the sub-

stance and foundation of the adventure which the contract is intended to carry out.

Examples of conditions:

Behn v. Burness, 1863, 3 B. & S. 751, 6 R.C. 492 (vessel "now in the port of Amsterdam").

Varley v. Whipp, [1900] 1 Q.B. 513 (reaping machine described as new the previous year and as having been used to cut only 50 or 60 acres); as to this case see § 56.

Fisher, Reeves & Co. v. Armour & Co., [1920] 3 K.B. 614 (goods "ex store Rotterdam").

Examples of warranties:

New Hamburg Mfg. Co. v. Webb, 1911, 23 O.L.R. 44 ("rebuilt" engine).

Cameron v. McIntyre, 1915, 35 O.L.R. 206, 26 D.L.R. 638 (promise to give a written warranty that horse sound).

Hart-Parr Co. v. Wells, 1918, 47 Can. S.C.R. 344, 43 D.L.R. 686, affirming 11 Sask. L.R. 132. 40 D.L.R. 169 (warranty of good material and certain horse-power capacity).

Case Threshing Machine Co. v. Mitten, 1919, 59 Can. S.C.R. 118, 49 D.L.R. 30, reversing 12 Sask. L.R. 1, 44 D.L.R. 40 (warranty excluded by terms of contract).

In the United Kingdom the definition of warranty already quoted (Ont. s. 2; U. K. s. 62) applies only to England and Ireland; and the Sale of Goods Act (U. K. s. 62) provides:

> As regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

The statute further provides (U. K. s. 11 (2)):

> **11.**—(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

In the United States the use of the terms "condition" and "warranty" is different from their use in the Sales of Goods Act. In the latter statute the terms indicate two kinds of stipulations or promises —the performance of a condition being essential, and its breach therefore giving rise to the right to repudiate the contract, the performance of a warranty not being essential, and its breach therefore merely giving rise to a claim for damages. In the Uniform Sales Act, on the other hand, this distinction is obliterated, both kinds of promises being designated warranties, and the right to rescind the contract and reject the goods being allowed for breach of warranty. The term "condition" is apparently used in the narrower sense of a term by which the obligation of either of the parties is made subject to the happening of a contingency or event, and not as including a promise, the performance of which is essential. See § 54, where the relevant provisions of the Uniform Sales Act are quoted.

§ 53. Stipulations as to time.

The Sale of Goods Act (Ont. s. 12; U. K. s. 10) provides;

> **12.**—Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

In the United Kingdom it is further provided, by sub-s. 2, that in a contract of sale "month" means *prima facie* calendar month. In Ontario it is provided by the Interpretation Act, R.S.O. 1914, c. 1, s. 29, that in every statute, unless the context otherwise requires, "month" shall mean calendar month.

In Hartley v. Hymans, [1920] 3 K.B. 475, at pp. 483-4, McCardie J., referring to the foregoing section, said:

> This section gives a very slender notion of the existing law, and it is well to remember s. 61 (2) [Ont. s. 58 (1)] which provides (*inter alia*) "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act . . . shall continue to apply to contracts for the sale of goods."

Now the common law and the law merchant did not make the question whether time was of the essence depend on the terms of the contract, unless indeed those terms were express on the point. It looked rather to the nature of the contract and the character of the goods dealt with In ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery: see per Lord Cairns L.C., in Bowes v. Shand, 1877, 2 App. Cas. 455, 463, 464 (sale of rice); per Cotton L.J., in Reuter v. Sala, 1879, 4 C.P.D. 239, 249, (sale of pepper); and per Lord Esher M.R., in Sharp v. Christmas, 1892, 8 Times L.R. 687 (sale of potatoes). In Paton v. Payne, 1897, 35 S.L.R. 112, however, it was held by the House of Lords that in a contract for the sale and delivery of a printing machine time was not of the essence. This point is not fully dealt with in Benjamin on Sale, 5th ed., pp. 588 ff., and no general rule appears to be stated in that treatise. But in Blackburn on Sale, 3rd ed., pp. 244 ff., the matter is more clearly treated and it is laid down that "In mercantile contracts, stipulations as to time (except as regards time of payment) are usually of the essence of the contract." I may add that the relevant decisions on the point are excellently summarized in Halsbury's Laws of England, vol. 25, p. 152, . . . With the above text books may be contrasted the passage in Addison on Contracts, 11th ed., p. 543.

Now if time for delivery be of the essence of the contract, as in the present case, it follows that a vendor who has failed to deliver within the stipulated period cannot *prima facie* call upon the buyer to accept delivery after that period has expired. He has himself failed to fulfil the bargain and the buyer can plead the seller's default and assert that he was not ready and willing to carry out his contract. That this is so seems clear. It is, I take it, the essential juristic result when time is of the essence of the contract.

See also Willis, Sale of Goods, pp. 125-127; Chalmers, Sale of Goods, 7th ed. 1910, pp. 33, 207. As to time of delivery of goods, see chapter 6, § 63.

§ 54. Remedies for breach of condition and breach of warranty.

As has already appeared (§ 52), in the case of a breach of warranty, the injured party is entitled to damages, whereas in the case of a breach of condition, he has the alternative of treating the contract as being completely broken by non-performance.

The fact that the buyer has resold the goods does not necessarily preclude him from exercising his right to reject them for breach of condition if the inspection and rejection take place within a reasonable time.

Niagara Grain Co. v. Reno, 1916, 38 O.L.R. 159, 32 D.L.R. 576; as to the buyer's right of inspection, see chapter 6, § 66.

The injured party may, however, elect to treat a breach of condition as merely a breach of warranty.

The Sale of Goods Act (Ont. s. 13; U.K. s. 11) provides:

> 13.—(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

In this section the word "or" must be read as a conjunction co-ordinating two phrases which are equivalent one to the other. The meaning seems reasonably plain, namely, that the injured party, instead of insisting on his right to be discharged on account of the other party's breach of condition, and to reject the goods, may waive this right, that is, may content himself with his right of action for damages as on a breach of warranty. Ewart (Waiver Distributed, pp. 148-150) criticizes the wording of the section on the ground that it seems to allow an alternative between waiving the condition (that is treating the condition as non-existent) and treating the breach of condition as a breach of warranty, and doubtless the section would be improved if the word "and" were substituted for "or," or if the words "may waive the condition or" were omitted.

Under a contract for the sale of goods to be delivered within a certain period of time, the buyer's right to require

delivery within that period may be waived even after that period has expired; but it would seem that where the contract is within the Statute of Frauds (Sale of Goods Act, Ont. s. 6; U. K. s. 4), the waiver must be evidenced by writing.

Hartley v. Hymans, [1920] 3 K.B. 475 (cases reviewed).

In two cases the injured party may be obliged to treat a breach of condition as a breach of warranty.

The Sale of Goods Act (Ont. s. 13; U. K. s. 11) provides:

> **13.**—(3) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.
>
> (4) Nothing in this section shall affect the case of any condition or warranty, fulfillment of which is excused by law by reason of impossibility or otherwise.

The statute does not say that what was originally a condition is really degraded or converted into a warranty in either of the two cases mentioned, but merely that the buyer is limited to the remedies available for breach of warranty. Therefore, if a contract contains a stipulation that "sellers give no warranty expressed or implied as to growth, description or any other matters," this stipulation does not prevent the buyers from suing for damages for the breach of condition, even though the buyers have accepted the goods and are consequently obliged to treat the breach of condition as a breach of warranty.

Wallis v. Pratt, [1911] A.C. 394, [1910] 2 K.B. 1003, Fletcher Moulton L.J., at p. 1015; cf. Merrill v. Waddell, 1920, 47 O.L.R. 572, 54 D.L.R. 18 (retention and re-sale of goods by buyer).

The statute mentions two cases in which a buyer may be limited to his remedy as on a breach of warranty, but does not necessarily exclude the possibility that a buyer may in some other way preclude himself from taking advantage of the choice of remedies ordinarily given for breach of condition.

Wallis v. Pratt, [1910] 2 K.B. 1003, at p. 1013.

The question when the property in goods passes from the seller to the buyer is discussed in chapter 3. As to the effect of the passing of the property upon the buyer's remedies in case of breach of condition, see Armand v. Noonan, 1918, 41 O.L.R. 551, 41 D.L.R. 433; Hallam v. Bainton, 1919, 45 O.L. R. 483, 48 D.L.R. 120, S.C. *sub nom.* Bainton v. Hallam, 1920, 60 Can. S.C.R. 325, 54 D.L.R. 537.

The remedies for breach of warranty, (including the cases in which the buyer elects or is compelled to treat a breach of condition as a breach of warranty), are defined in the Sale of Goods Act (Ont. s. 52; U. K. s. 53) as follows:

52.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or

(*b*) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

In the United Kingdom it is further provided:

53.—(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

The question as to the measure of damages is discussed in chapter 8, § 85.

As has been pointed out in § 52, the use of the terms "condition" and "warranty" in the Uniform Sales Act in the United States is different from their use in the Sale of Goods Act. In the former statute the term "warranty" includes both the warranty and the (promissory) condition of the latter statute, and the remedies allowed for breach of warranty under the former statute are correspondingly wider. The term "condition" is used in a comparatively narrow sense in the Uniform Sales Act.

In the United States the Uniform Sales Act provides:

11.—(1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

12. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

69.—(1) Where there is a breach of warranty by the seller, the buyer may, at his election

(*a*) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price;

(*b*) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(*c*) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(*d*) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid;

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6) The measure of damages for breach of warranty is

the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

§ 55. Implied conditions and warranties.

In accordance with various provisions of the Sale of Goods Act, conditions and warranties may be implied in a contract of sale. It is, however, provided (Ont. s. 54; U. K. s. 55) as follows:

54. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

The Sale of Goods Act (Ont. s. 14; U. K. s. 12) provides:

14. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:

(*a*) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;

(*b*) an implied warranty that the buyer shall have and enjoy quiet possession of the goods; and

(*c*) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

The rule stated in sub-s. 1 is in accordance with the better opinion prevailing prior to the passing of the statute, namely, that by a contract of sale the seller impliedly undertakes that he has (or, in the case of an agreement to sell, that he will have) a right to sell the goods, unless the circumstances are such as to show that the seller is transferring only such pro-

perty as he may have in the goods. There is usually no implied undertaking, for instance, where the seller is selling in a special character, such as a mortgagee or pledgee, or a sheriff under an execution.

Peuchen v. Imperial Bank, 1890, 20 O.R. 325 (reviewing the cases); Sims v. Marryatt, 1851, 17 Q.B. 281; Eicholz v. Bannister, 1864, 17 C.B.N.S. 708, 23 R.C. 198; cf. 25 Halsbury, Laws of England, 153; Willis, Sale of Goods, 127-9. As to damages, see Confederation Life Association v. Labatt, 1900, 27 O.A.R. 321.

The distinction between the condition as to title and the warranty of quiet possession is similar to that between a covenant for title and one for quiet enjoyment. The former is an assurance by the grantor that he has the very estate in quantity and quality which he purports to convey; the latter is an assurance to the grantee against consequences of a defective title and of any disturbance thereupon. Thus if the title is defective, the buyer may, under the Sale of Goods Act, reject the goods, but if he has accepted them and is afterwards disturbed, he has his remedy by action for breach of warranty.

25 Halsbury, Laws of England, p. 154, note (*n*).

In the United States the similar section of the Uniform Sales Act contains the following additional provision:

13.—(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

§ 56. Sales by description and by sample.

The Sale of Goods Act (Ont. s. 15; U. K. s. 13) provides:

15. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description, and if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

The term "sale of goods by description" must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It would most frequently apply

to unascertained goods, but it may be applicable to specific goods where there is no identification otherwise than by description.

Varley v. Whipp, [1900] 1 Q. B. 513, Channel J., at p. 516; sed cf. New Hamburg Mfg. Co. v. Webb, 1911, 23 O.L.R. 44, at p. 55; Thornett v. Beers, [1919] 1 K.B. 486, at pp. 488-9.

To say that there is an implied condition that the goods shall correspond with the description is equivalent to saying that the buyer is entitled to get what he bargained for. As Lord Abinger said in Chanter v. Hopkins, 1838, 4 M. & W. 399, "If a man offers to buy *peas* of another and he sends him beans, he does not perform his contract; . . the contract is to sell peas, and if he sends him anything else in their stead it is a non-performance of it."

Cf. Willis, Sale of Goods, pp. 140, 141; Bowes v. Shand, 1877, 2 App. Cas. 455, at p. 480; but if peas are delivered which correspond with the description (and the sample, in case of sale by sample), the buyer must ordinarily take his chances as to the quality: see § 57.

Examples of sales by description:

Niagara Grain Co. v. Reno, 1916, 38 O.L.R. 159, 32 D. L.R. 576 (contract for "No. 1 timothy" hay; No. 3 supplied).

Alabastine Co. v. Canada Producer Co., 1914, 30 O.L. R. 394, 17 D.L.R. 813 (engine of specified type and power).

Examples of contract by description as well as by sample:

Azémar v. Casella, 1867, L.R. 2 C.P. 431, 677, 23 R.C. 440 (cotton "guaranteed equal to sealed sample"—buyer entitled to kind of cotton which he bargained for as well as quality equal to sample).

Wallis v. Pratt, [1911] A.C. 394, at p. 399, [1910] 2 K.B. 1003 (sale by sample with description added: "common English sainfoin." Seed supplied in accordance with sample, but not with description).

The Sale of Goods Act (Ont. s. 17; U. K. s. 15) provides:

17.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample,

(*a*) there is an implied condition that the bulk shall correspond with the sample in quality;

(*b*) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and

(*c*) there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

The statute (Ont. s. 2; U. K. s. 62) provides that the "quality" of goods includes their state or condition.

As to the general right of a buyer to a reasonable opportunity of examining goods which he has not previously examined, see chapter 6, § 66.

Although a sample is exhibited at the time of the contract, it does not follow necessarily that the contract is for sale by sample. If the sample is exhibited merely to show the kind of goods which the seller has to sell, and the contract makes no reference to the sample, the contract may be one for sale by description, but is not one for sale by sample.

Tye v. Fynmore, 1813, 3 Camp. 462, 23 R.C. 40; Gardiner v. Gray, 1815, 4 Camp. 144; Willis, Sale of Goods, pp. 145-6; cf. Re Faulkners, 1917, 40 O.L.R. 75, at pp. 83-4, 38 D.L.R. 84 (sale from samples distinguished from sale by sample); Dominion Paper Box Co. v. Crown Tailoring Co., 1918, 42 O.L.R. 249, 45 D.L.R. 557.

The fact that there has been such inspection and acceptance of the goods as results in the passing of the property in the goods does not necessarily preclude the buyer from claiming damages on account of the goods not being equal to the sample. See chapter 6, § 66.

§ 57. Implied conditions as to quality or fitness.

In the case of Jones v. Just, 1868, L.R. 3 Q.B. 197, at pp. 202-3, 23 R.C. 466, at pp. 471-2, Mellor J., delivering the judgment of the Court of Queen's Bench (Cockburn C.J.,

Blackburn and Mellor JJ.) stated and discussed, with reference to many earlier cases, the following rules:

> First, where goods are in esse, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment he may if he chooses require a warranty. In such a case, it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable.
>
> Secondly, where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty.
>
> Thirdly, where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.
>
> Fourthly, where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.
>
> Fifthly, where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article.

These rules have been frequently quoted and discussed in later cases, and they form the basis of the present statutory provisions upon the subject.

It will be noted, however, that the word "warranty" is used in the rules. In accordance with modern usage and with the distinction consistently drawn in the Sale of Goods Act between conditions and warranties, the term in question is now more correctly described as a condition.

The Sale of Goods Act (Ont. s. 16; U. K. s. 14) provides:

> **16.** Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> (*a*) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
>
> (*b*) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

(*c*) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

(*d*) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

The statute further provides (Ont. s. 2; U. K. s. 62) that the quality of goods includes their state or condition.

Prior to the passing of the Sale of Goods Act it was held that where there was a contract for the sale of goods by a manufacturer, as such, and not as a dealer, there was an implied condition that the goods were of the seller's own manufacture. Johnson v. Raylton, 1881, 7 Q.B.D. 438; followed in Ontario in Randall v. Sawyer-Massey Co., 1918, 43 O.L.R. 602. A provision to the same effect was contained in the Sale of Goods Act as originally drawn by Chalmers, but was struck out in the House of Lords. Apart from any usage of trade such a condition may still be implied, unless it can be considered as excluded by the provision that "there is no implied warranty or condition as to the quality . . . of goods supplied under a contract of sale, except" as provided in the statute.

See 25 Halsbury, Laws of England, p. 162, note (*t*); Chalmers, Sale of Goods, 7th ed. 1910, p. 46.

Examples of the application of the rule *caveat emptor*.

Ward v. Hobbs, 1878, 4 App. Cas. 13 (diseased pigs); cf, McKay v. Davey, 1913, 28 O.L.R. 322, 12 D.L.R. 458; O'Mealey v. Swartz, 1918, 11 Sask. L.R. 376.

Borthwick v. Young, 1886, 12 O.A.R. 671 (apples; opportunity for inspection).

Oldrieve v. C. G. Anderson Co., 1916, 35 O.L.R. 396, 27 D.L.R. 231 (goods in esse inspected and accepted).

Hall Motors v. Rogers, 1918, 44 O.L.R. 327, 46 D.L.R. 639 (second-hand motor trucks).

Examples of exclusion of implied conditions or warranties by express term:

Dickson v. Zizinia, 1851, 10 C.B. 602, 23 R.C. 494; Ward v. Hobbs, 1878, 4 App. Cas. 13 (diseased pigs sold "with all faults"—"no warranty will be given").

Sawyer-Massey Co. v. Ritchie, 1910, 43 Can. S.C.R. 614.

Clark v. Waterloo Mfg. Co., 1910, 20 Man. R. 289.

Examples of implied condition of fitness for particular purpose:

Randall v. Newson, 1877, 2 Q.B.D. 102, 23 R.C. 480 (pole for carriage).

Preist v. Last, [1903] 2 K.B. 148 (hot water bottle).

Frost v. Aylesbury Dairy Co., [1905] 1 K.B. 609 (milk).

Bristol Tramways Co. v. Fiat Motors, [1910] 2 K.B. 831 (motor omnibus).

Geddling v. Marsh, [1920] 1 K.B. 668 (bottle containing mineral water).

Grocers Wholesale Co. v. Bostock, 1910, 22 O.L.R. 130 (goods sold for human consumption).

Canadian Gas Power v. Orr, 1911, 23 O.L.R. 616, 46 Can. S.C.R. 636 (engine and dynamo).

Hill v. Rice, Lewis & Son, 1913, 28 O.L.R. 366, 12 D.L.R. 588 (box of cartridges; buyer relying on his own judgment).

Hopkins v. Jamison, 1914, 30 O.L.R. 305, 18 D.L.R. 88 (steam shovel).

Alabastine Co. v. Canada Producer Co., 1914, 30 O.L.R. 394, 17 D.L.R. 813 (gas engine).

Wood v. Anderson, 1915, 33 O.L.R. 143, 21 D.L.R. 247 (stallion).

Dominion Paper Box Co. v. Crown Tailoring Co., 1918, 42 O.L.R. 249, 43 D.L.R. 557 (paper boxes).

Randall v. Sawyer-Massey Co., 1918, 43 O.L.R. 602 (motor truck).

Examples of implied condition that goods shall be of merchantable quality:

Wren v. Holt, [1903] 1 K.B. 610 (sale of beer over counter).

Mooers v. Gooderham, 1887, 14 O.R. 451 (rye).

The proviso that "if the buyer has examined the goods," there shall be no implied condition as regards defects which such examination ought to have revealed, as originally drawn was confined to cases where the buyer "had no opportunity of examining the goods" (Chalmers, Sale of Goods, 7th ed. 1910, p. 46), in accordance with the rules stated by Mellor J., in Jones v. Just, *supra*. Under the present wording, it is not sufficient that the buyer should have had the opportunity of inspecting the goods, he must have examined them.

Thornett v. Beers, [1919] 1 K.B. 486.

CHAPTER VI.

DELIVERY, ACCEPTANCE AND PAYMENT.

§ 61. Delivery and payment.

The Sale of Goods Act (Ont. s. 2; U. K. s. 62) defines "delivery" as meaning the "voluntary transfer of possession from one person to another."

As to "actual receipt" under the Statute of Frauds, see chapter 2, § 26.

The Sale of Goods Act (Ont. ss. 27, 28; U.K. ss. 27, 28) provides:

> **27.** It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.
>
> **28.** Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

If A. and X. agree that the performance of their respective promises shall be simultaneous, or at least that each shall be ready and willing to perform his promise at the same time, then the performance of each promise is conditional on this concurrence of readiness and willingness to perform; the conditions are concurrent. Thus in a sale of goods where no time is fixed for payment, the buyer must be ready to pay and the seller ready to deliver at one and the same time. The promises are interdependent and conditional upon each other, so that if

A. fails to deliver, X. may not only sue for damages but may also refuse to pay.

Anson, Contract, 15th ed. 1920, pp. 354-5; Morton v. Lamb, 1797, 7 T.R. 125, 23 R.C. 500 (plaintiff in an action for non-delivery averred that he was always ready and willing to receive the goods, whereas he ought to have averred that he was always ready and willing to pay for the goods).

Delivery and payment are, however, not concurrent conditions if, on the one hand, the contract is for the delivery of the goods on credit, or if, on the other hand, they are to be paid for on a day certain, irrespective of delivery. As to an action for the price in the latter case, see chapter 8, § 81.

Even where the contract provides for delivery on credit, if the buyer becomes insolvent or states that he will not pay for the goods, the seller need not deliver except upon receiving payment.

In re Edwards, 1873, L.R. 8 Ch. 289; Re Faulkners, 1917, 40 O.L.R. 75, 38 D.L.R. 84, and cases cited; see also chapter 7, § 73, as to the unpaid seller's lien or right of retention.

Under the contract known as a c.i.f. contract (that is, a contract for the sale of goods at a price to cover cost, insurance and freight), the seller must (1) ship at the port of shipment goods as described in the contract, (2) procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract, (3) procure insurance for the benefit of the buyer upon the terms current in the trade, and (4) make out an invoice as described by Blackburn J., in Ireland v. Livingston, 1872, L.R. 5 H.L. 395, at p. 406, or in some similar form, and, finally, tender the bill of lading, insurance policy and invoice to the buyer, so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss, if they are lost on the voyage. The contract constitutes an agreement that the delivery of the goods in conformity with the contract shall be delivery on board ship at the port of shipment, completed by tender of the documents to the buyer, and the buyer must then be ready and willing to pay the price, whether the

contract expressly provides for "payment against shipping documents" or not. Various provisions of the Sale of Goods Act which were primarily drafted in relation to the sale and delivery of goods on land can be applied to c.i.f. contracts only *mutatis mutandis,* because under such contracts the obligation is to deliver documents rather than goods.

Clemens Horst Co. v. Biddell, [1912] A.C. 18, reversing Biddell v. Clemens Horst Co., [1911] 1 K.B. 934, and restoring [1911] 1 K.B. 214; Orient Co. v. Brekke, [1913] 1 K.B. 531; Karberg Co. v. Blythe & Co., [1916] 1 K.B. 495, at pp. 504, 513; Manbre Sacharine Co. v. Corn Products Co., [1919] 1 K.B. 198; Wilson, Holgate & Co. v. Belgian Grain and Produce Co., [1920] 2 K.B. 1; Schmidt v. Wilson & Canham, 1920, 47 O.L.R. 194, affirmed, 48 O.L.R. 257, 55 D.L.R. 576.

§ 62. Mode and place of delivery.

The Sale of Goods Act (Ont. s. 29; U. K. s. 29) provides:

29.—(1) Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he has one, and, if not, his residence; provided that if the contract be for the sale of specific goods which to the knowledge of the parties, when the contract is made, are in some other place, then that place is the place of delivery.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods in a deliverable state must be borne by the seller.

If under a contract of sale the seller is authorized or required to send the goods to the buyer, the seller may deliver

the goods to a carrier in accordance with s. 32 of the Sale of Goods Act (§ 65), but if the contract does not expressly or impliedly require the seller to send the goods to the buyer, the seller need only put the goods in a deliverable state, and permit the buyer to take possession at the place of delivery as defined by sub-s. 1 of s. 29. The last mentioned provision is to the same effect as the common law rule. Smith v. Chance, 1819, 2 B. & Ald. 753, at p. 755; Wood v. Tassell, 1844, 6 Q.B. 234; Hertle v. Jenny, 1915, 49 N.S.R. 6, 22 D.L.R. 742.

The Sale of Goods Act provides (Ont. s. 2; U. K. s. 62) that goods are deemed to be in a "deliverable state" when they are in such a state that the buyer would under the contract be bound to take delivery of them.

In the United States the corresponding section of the Uniform Sales Act has the following provision in place of sub-s. 3 of s. 29 of the Sale of Goods Act:

> **43.**—(3) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

As to the effect of the issue and transfer of a document of title to the goods, see chapter 4, §§ 43 ff., and as to the effect of the transfer of a document of title upon the seller's lien or right of stoppage in transitu, see chapter 7, § 75. As to c.i.f. contracts, see § 61.

§ 63. Time of delivery.

As regards delivery of goods time is *prima facie* of the essence of the contract. See Hartley v. Hymans, [1920] 3 K. B. 475, referred to in chapter 5, § 53.

The Sale of Goods Act (Ont. s. 29; U. K. s. 29) provides:

> **29.**—(2) Where under the contract of sale the seller is bound to send the goods to the buyer but no time for

sending them is fixed, the seller is bound to send them within a reasonable time.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

In the absence of an express provision in a contract of sale as to the time of delivery, a provision may be implied in some cases, as, for instance in the case of goods which to the knowledge of the seller are needed for a certain purpose at a certain time. If, however, there is no express or implied term requiring delivery at a certain time, the obligation of the seller is to deliver within a reasonable time. The question what is a reasonable time depends upon the actual existing circumstances, so that the time for delivery may be extended by circumstances necessarily involving delay, such as a strike, except in so far as the circumstances are caused or contributed to by the seller.

Hick v. Raymond, [1893] A.C. 22; Sims v. Midland Ry. Co., [1913] 1 K.B. 103; Henry Hope & Sons v. Canada Foundry Co., 1917, 40 O.L.R. 338, 39 D.L.R. 308.

A contract for delivery of goods "at once" is a contract for delivery within a reasonable time.

Reg. v. Rogers, 1877, 3 Q.B.D. 28, at p. 33; Petrie v. Rae, 1919, 46 O.L.R. 19. As to damages for non-delivery see chapter 8, § 83.

Contracts for the sale of goods frequently require the performance of acts by a buyer before the obligation of delivery falls upon the seller, for example, where the class of goods, the size or the quantities must be specified by the buyer. In such a contract where the words "as required," or the like words, do not appear, then upon the passing of a reasonable time the buyer will have lost his right to call upon the seller to deliver. Where the words "as required," or like words appear, then the contract does not come to an end merely by the lapse of a reasonable time—it being necessary that the seller should have given notice to the buyer of his intention to put an end to the contract in the event of the buyer's not requiring delivery—but even in the absence of such notice, the lapse of time may be so long as to induce the court to infer

that it was the intention of both parties to abandon the contract.

Jones v. Gibbons, 1853, 8 Ex. 920, as explained in Pearl Mill Co. v. Ivy Tannery Co., [1919] 1 K.B. 78; see also Sierichs v. Hughes, 1918, 42 O.L.R. 608, 43 D.L.R. 297.

If goods are to be delivered on the buyer's ship or "on car," the seller's obligation to deliver does not arise until the buyer has provided the ship or the car, and it may be expressly or impliedly agreed that notice shall be given by the buyer to the seller that the ship or the car is ready to receive the goods.

Armitage v. Insole, 1850, 14 Q.B. 728; Stanton v. Austin, 1872, L.R. 7 C.P. 651; Stuart v. Clarke, 1917, 11 Alta. L.R. 551, 36 D.L.R. 254.

§ 64. Delivery of wrong quantity or in instalments.

The general rule is that the seller must deliver at one time the exact quantity of goods which he has contracted to deliver.

The Sale of Goods Act (Ont. s. 30; U. K. s. 30) provides:

30.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the sellers delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract, and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

In sub-s. 4 of s. 30 of the Manitoba statute, the words "or in any particular trade or business" are added.

The words "mixed with" in sub-s. 3 cannot refer to physical confusion, but are equivalent to "accompanied by." If a portion only of the goods required to be delivered is delivered, properly packed in accordance with the contract, the buyer has under sub-s. 1 the right to reject them. If the portion so delivered is accompanied by the rest of the goods not properly packed in accordance with the contract, the buyer has under sub-s. 3 the right to reject the whole.

Moore v. Landauer, [1921] 1 K.B. 73.

In the carrying out of a commercial contract some slight elasticity with regard to the quantity of goods is unavoidable. The tender of a wrong quantity evidences an unreadiness and unwillingness to perform, but only if the excess or deficiency in quantity is such as to be capable of influencing the mind of the buyer. The seller has no right to impose upon the buyer the burden of the payment of money not agreed to be paid, but the excess in the quantity of goods delivered may be so trifling that the buyer is not entitled under sub-s. 2 to reject the whole.

Shipton, Anderson & Co. v. Weil Brothers & Co., [1912] 1 K.B. 574.

If the contract is for the delivery of a specified quantity, qualified by the words "more or less," "about," or other similar words, a reasonable latitude as to quantity is allowed —of course subject to any definite limitation as to maximum or minimum quantity stated in the contract. Much greater latitude as to quantity is allowed in a case in which the subject matter of the contract is a complete cargo or the remainder of cargo, or a whole set or bulk lot, with an approximate statement or estimate of the probable quantity.

In re Harrison and Micks, Lambert & Co., [1917] 1 K.B. 755; London Electric Co. v. Eckert, 1917, 40 O.L.R. 208, affirmed, *sub nom.* Eckert v. London Electric Ry. Co., 1918, 57 Can. S.C.R. 610; Susman v. Baker, 1918, 44 O.L.R. 39; Boston Book Co. v. Canada Law Book Co., 1920, 48 O.L.R. 238; see also 25 Halsbury, Laws of England, pp. 212-215, Chalmers, Sale of Goods, 7th ed. 1910, pp. 86, 209.

In the United States the corresponding section of the Uniform Sales Act contains the following provision in the place of sub-s. 1 of s. 30 of the Sale of Goods Act:

> **44.**—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

The Sale of Goods Act (Ont. s. 31; U.K. s. 31) provides:

> **31.**—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.
>
> (2) When there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, [or fails to deliver one or more instalments], or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

The rule stated in sub-s. 1 follows from the rule stated in s. 30 of the Sale of Goods Act, namely, that where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them. As to the general principle, see Reuter v. Sala, 1879, 4 C.P.D. 239; Honck v. Muller, 1881, 7 Q.B.D. 92. In the latter case, at p. 99, Bramwell L.J. said:

> Suppose a man orders a suit of clothes, the price being £7—£4 for the coat, £2 for the trousers, and £1 for the waistcoat, can he be made to take the coat

only, whether they were all to be delivered together, or the trousers and waistcoat first?

In a case in which the seller agreed to deliver goods in London, ex a certain ship, to the buyer's craft alongside, it was held that the parcel of goods to be delivered was indivisible, and that the buyer was entitled to delivery of the whole parcel before the ship left the port to deliver goods elsewhere. As part only of the goods were delivered, the buyer's rights were those defined by s. 30 of the Sale of Goods Act.

Behrend v. Produce Brokers Co., [1920] 3 K.B. 530.

The editors of Benjamin, Sale, 5th ed. 1906, p. 723, remark that s. 31, sub-s. 2 is a striking instance of imperfect codification. Inter alia, they suggest that it does not cover the case where the seller omits to make any delivery at all. To meet this particular criticism, the words "or fails to deliver one or more instalments," which do not appear in the original statute, were inserted in the Ontario statute.

If there is a total failure of performance by one party to a contract, the usual result is that the other party has the right to consider himself discharged from the obligation to perform on his part, and the same result usually follows if there is a partial, but substantial, failure to perform an indivisible contract. If, however, a contract provides for delivery of goods in stated instalments, which are to be separately paid for, it is more difficult to say what degree of failure to perform by one party will give to the other party the right to consider himself discharged.

In the leading case of Mersey Steel and Iron Co. v. Naylor, 1884, 9 App. Cas. 434, at pp. 438, 439, 23 R.C. 504, at pp. 516, 517, the Earl of Selborne, L.C. said:

> I am content to take the rule as stated by Lord Coleridge in Freeth v. Burr, 1874, L.R. 9 C.P. 208, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute

refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.

The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation, but a deliberate breach of a single provision may, in special circumstances, and particularly if the provision be important, amount to a repudiation of the whole contract. It is also to be remembered that unless a different intention appears from the terms of a contract, stipulations as to the time of payment are not deemed to be of the essence of a contract of sale.

In re Rubel, etc. Co. and Vos, [1917] 1 K.B. 315, at p. 322; Payzu v. Saunders, [1919] 2 K.B. 581; see also Dominion Radiator Co. v. Steel Co., 1918, 43 O.L.R. 356; as to damages for non-delivery, see chapter 8, § 83.

In Halsbury's Laws of England, vol. 25, p. 218, par. 377, it is stated:

> The contract, so far as it applies to any particular instalment of goods, is discharged where default has been made in the delivery or acceptance of the instalment; . . Accordingly the seller cannot afterwards claim to deliver the instalment, nor can the buyer demand it.

This statement is qualified by the following:

> The fact that the parties have silently omitted to enforce and to require the delivery of any instalment of the goods, or have by mutual consent forborne its delivery at the contract time, is relevant, but not conclusive, to shew a mutual agreement to rescind the contract, so far as it applies to the instalment undelivered.

The qualifying statement above quoted, so far as it relates to the effect of silent omission to enforce and require delivery, was disapproved, as not being supported by the authorities, by the majority of the court in Doner v. West-

ern Canada Flour Mills Co., 1917, 41 O.L.R. 503, 41 D.L.R. 476. As to failure to insist upon punctual delivery of instalments or concurrence in postponed delivery, see also Sierichs v. Hughes, 1918, 42 O.L.R. 608, 43 D.L.R. 297; Gerow v. Hughes, 1918, 42 O.L.R. 621, 43 D.L.R. 307; Adolph Lumber Co., v. Meadow Creek Lumber Co., 1919, 58 Can. S.C.R. 306, 45 D.L.R. 579.

In the United States the corresponding provision of the Uniform Sales Act is as follows:

> **45.**—(1) Unless otherwise agreed the buyer of goods is not bound to accept delivery thereof by instalments.
>
> (2) Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not a right to treat the whole whole contract as broken.

In other words under this section the materiality of the breach, not repudiation by one party, is made the test of the right of the other party to refuse to proceed further under the contract.

§ 65. Sending of goods to buyer.

If the contract does not expressly or impliedly require the seller to send the goods to the buyer, the buyer need only put the goods in a deliverable state and permit the buyer to take possession at the place of delivery as defined by s. 29 of the Sale of Goods Act (§ 62).

The Sale of Goods Act (Ont. s. 32; U.K. s. 32) provides:

> **32.**—(1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, the delivery of the goods to a common carrier whether named by the buyer or not, for the purpose of

transmission to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the common carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.

The word "common" inserted before the word "carrier" in sub-ss. 1 and 2 in the Ontario statute does not appear in the statute as enacted in the United Kingdom or in the other provinces of Canada.

In Dunlop v. Lambert, 1839, 6 Cl. & F. 603, at pp. 620-1, Lord Cottenham said:

> It is no doubt true as a general rule that the delivery by the consignor to the carrier is delivery to the consignee, and that the risk is after such delivery the risk of the consignee. That is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance. . . And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent.
>
> But though the authorities all establish the general inference I have stated, yet the general inference is capable of being varied by the circumstances of any special arrangement between the parties, or of any particular mode of dealing between them.

See also Calcutta Co. v. DeMattos, 1863, 32 L.J.Q.B. 322, at p. 328, quoted in note in Chalmers, Sale of Goods, 7th ed. 1910, pp. 213-4; Graham v. Laird, 1909, 20 O.L.R. 11. As to the passing of the property, and as to reservation of the right of disposal, see chapter 3, §§ 37 and 38; as to the risk of loss, see chapter 1, §15.

A carrier, though he is presumed to receive the goods in the character of agent for the consignee, is not necessar-

ily his agent for the purpose of actual receipt, still less his agent to accept the goods, within the Statute of Frauds; but the consignee may so act as to constitute the carrier his agent for both these purposes.

Bushel v. Wheeler, 1844, 15 Q.B. 442, 23 R.C. 213; Meredith v. Meigh, 1853, 2 E. & B. 364, 23 R.C. 217; as to acceptance and actual receipt, see chapter 2, § 26.

In the United Kingdom the corresponding section further provides:

32.—(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

In the provinces other than Ontario this sub-section is retained. In Manitoba the words "lake or river" are inserted after the word "sea."

The section is discussed and analyzed in Wimble, Sons & Co. v. Rosenberg, [1913] 3 K.B. 743, in which it was held, by a majority of the court, that sub-s. 3 applies to an f.o.b. contract, and, by one judge, that if before the goods are shipped the buyer has all information necessary to enable him to insure, the seller is not obliged to give notice to the buyer of the shipment of the goods on a particular ship. See also Northern Steel and Hardware Co. v. Batt, 1917, 33 Times L.R. 516.

Sub-s. 3 does not apply to a c.i.f. contract entered into in time of peace, inasmuch as the contract itself provides for all the insurance that is contemplated or usual at the time when it is made, and the sub-section does not impose on the seller any new obligation to give notice to the buyer so as to enable him to insure against war risks, if, after the date of the contract, war becomes imminent.

Law & Bonar v. British American Tobacco Co. [1916] 2 K.B. 605; as to c.i.f. contracts, see § 61.

The Sale of Goods Act (Ont. s. 33; U.K. s. 33) provides:

33. Where the seller of goods agrees to deliver them

at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

To this statutory rule is added in 25 Halsbury, Laws of England, p. 223, the statement that the seller must bear the risk of any extraordinary or unusual deterioration during transit.

In the case of perishable goods, even if the seller has not agreed to deliver them at his own risk, it is said that he is deemed to take the risk of the goods not arriving in the ordinary course of transit and of their not remaining in a merchantable condition for a reasonable time after arrival.

See 25 Halsbury, Laws of England, p. 224, citing Beer v. Walker, 1877, 46 L.J.Q.B. 677; but cf. Mayhew v. Scott, 1915, 8 Alta. L.R. 66, 21 D.L.R. 54.

As to risk of loss generally, see chapter 1, § 5.

§ 66. Inspection and acceptance.

In the case of a contract for sale by sample there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample. See chapter 5, § 56.

Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. See chapter 5, § 57.

The Sale of Goods Act (Ont. s. 34; U.K. s. 34) provides:

34.—(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request,

to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

The right to examine the goods can be material only in a case in which, if the goods are not in conformity with the contract, the buyer has the right to reject them. If the contract is for the sale of specific goods, not subject to any express or implied condition, and these goods are delivered, the buyer is obliged to accept them. The sole object of an examination of the goods on delivery can be to ascertain whether the goods delivered are the goods bought or agreed to be bought. If, on the other hand, the contract is for the sale of goods by description or by sample, or the contract is subject to some condition express or implied as to quality or otherwise, inasmuch as the buyer may be entitled to reject the goods altogether as not being in conformity with the contract, he is entitled to a reasonable opportunity to examine the goods, and until he has had this reasonable opportunity he is not deemed to have accepted them. If there is a mere breach of warranty there is of course no right to reject the goods. As to conditions and warranties, see chapter 5.

Sub-s. 2 of s. 34 does not apply to a c.i.f. contract, because by the terms of such a contract the buyer agrees to pay on the tender by the seller of the invoice, bill of lading and insurance policy, and the tender of these documents constitutes delivery, so that no opportunity for examination of the goods can be afforded contemporaneously with delivery. In the ordinary case, however, of a contract for the sale of goods f.o.b. or other contract by which the buyer has not contracted himself out of his right to examine the goods before acceptance, the general rule at common law was that which is now stated in s. 34. A tender of delivery accompanied by a refusal to permit examination would therefore be invalid.

As to c.i.f. contracts, see Clemens Horst Co. v. Biddell, [1912] A. C. 18 and other cases cited in § 61; Morrison v. Morrow, 1916, 36 O.L.R. 400, 30 D.L.R. 350.

Prima facie the goods should be examined at the place and time of delivery, but the contract may expressly or impliedly provide that the time of inspection shall be subsequent to delivery and that the place of inspection shall be different from that of delivery. The obligation of the seller is to afford an adequate opportunity of inspection and that of the buyer is to avail himself of the opportunity.

Benjamin, Sale, 5th ed. 1906, p. 753; Perkins v. Bell [1893] 1 Q.B. 193; Graham v. Laird, 1909, 20 O.L.R. 11; Thames Canning Co. v. Eckardt, 1915, 34 O.L.R. 72, 23 D.L.R. 805; Merrill v. Waddell, 1920, 47 O.L.R. 572, 54 D.L.R. 18.

In the United States the section of the Uniform Sales Act corresponding with s. 34 of the Sale of Goods Act contains the following additional provision:

47.—(3) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

The Sale of Goods Act (Ont. s. 35; U.K. s. 35) provides:

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Acceptance as defined by this section has the effect of preventing the buyer from exercising any right which he may otherwise have had to reject the goods as not being in conformity with the contract, and, as already pointed out, the buyer is, as a rule, not deemed to have accepted the goods unless and until he has had a reasonable opportunity of examining them.

As regards the provision of the Sale of Goods Act which has replaced the Statute of Frauds, there is acceptance "when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not." See chapter 2, § 26. For the purpose of the Statute of Frauds an act is required, and mere words are not sufficient, whereas under s. 35 an express verbal acceptance or the mere retention of the goods may be sufficient. Again, for the former purpose any act which recognizes a pre-existing contract of sale is sufficient, but under s. 35, the words or act or conduct of the buyer must in effect express the willingness of the buyer to keep the goods. Where, for instance, a buyer under a contract for sale of wheat by sample, having received a number of sacks of wheat delivered at his premises, opened the sacks and examined their contents to see if they were equal to sample, but immediately after doing so gave notice to the seller that he refused to take the wheat as not being equal to sample, it was held that there was evidence of acceptance under the Statute of Frauds, though not an acceptance which would preclude the defendant from rejecting the wheat if it was not equal to sample.

Page v. Morgan, 1885, 15 Q.B.D. 228; Abbott v. Wolsey, [1895] 2 Q.B. 97.

The Sale of Goods Act (Ont. s. 13; U.K. s. 11) provides that where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect. This provision and other provisions quoted in chapter 5, § 54, make it clear that acceptance of the goods does not necessarily prevent the buyer from claiming damages on the ground that the goods are not in conformity with the contract, and the rule appears to have been the same at common law. Acceptance of the goods has, however, its dangers for the buyer. His conduct in taking and dealing

with the goods will be scrutinised with some care, and will sometimes have the effect of estopping him from saying that his acceptance is not an acceptance of the goods as being in conformity with the contract.

Hallam v. Bainton, 1919, 45 O.L.R. 483, at p. 488, 48 D.L.R. 120, at p. 123, S.C. affirmed *sub nom.* Bainton v. Hallam, 1920, 60 Can. S.C.R. 325, 54 D.L.R. 537; Merrill v. Waddell, 1920, 47 O.L.R. 572, 54 D.L.R. 18; cf. Morton v. Tibbett, 1850, 15 Q.B. 428; Willis, Sale of Goods, pp. 88 ff.

In the United States the Uniform Sales Act provides:

49. In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

In the United Kingdom the Sale of Goods Act provides:

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

§ 67. Refusal to accept.

The Sale of Goods Act (Ont. s. 36; U.K. s. 36) provides:

36. Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

The Sale of Goods Act (Ont. s. 37; U.K. s. 37) further provides:

> **37.** When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not, within a reasonable time after such request, take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods; provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

As to damages for non-acceptance, see chapter 8, § 82.

In the United States the corresponding provision of the Uniform Sales Act is as follows:

> **51.** When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

CHAPTER VII.

RIGHTS AGAINST THE GOODS.

§ 71. Proprietary remedies of the buyer.

If an agreement to sell goods is broken by the seller, as the property in the goods has not passed to the buyer, the buyer has only personal remedies against the seller. See chapter 8, where the buyer's remedies by way of action for damages or action for specific performance are discussed. In the case of a sale, however, if the seller breaks his engagement to deliver the goods, then, as the property in the goods has passed to the buyer, the buyer has not only personal remedies against the seller, but has also the usual proprietary remedies in respect of the goods themselves, such as the actions for conversion and detinue.

See 25 Halsbury, Laws of England, p. 118, referring, as to detinue, to Langton v. Higgins, 1859, 4 H. & N. 402, and, as to conversion, to Chinery v. Viall, 1860, 5 H. & N. 288; cf. Hollins v. Fowler, 1875, L.R. 7 H.L. 757, 2 R.C. 410; Consolidated Co. v. Curtis, [1892] 1 Q. B. 495, 25 R.C. 161; see also title Trover and Detinue, 27 Halsbury, Laws of England, pp. 887 ff.; McGregor v. Whalen, 1914, 31 O.L.R. 543, 20 D.L.R. 489.

In the United States the Uniform Sales Act provides:

66. Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

§ 72. Rights of unpaid seller.

The seller's personal remedies against the buyer by way of action for the price of the goods or for damages for non-acceptance are discussed in chapter 8. An unpaid seller may also have certain rights *in rem*—against the goods themselves—rights which are of special value in the case of the buyer's insolvency or inability to pay the price or damages.

The Sale of Goods Act (Ont. s. 38; U.K. s. 38) provides:

> **38.**—(1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—
>
> (a) when the whole of the price has not been paid or tendered;
>
> (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.
>
> (2) In this part of this Act the term "seller" includes any person who is in the position of a seller, as for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid or is directly responsible for the price.

"This part" of the statute includes ss. 38 to 47.

In the United States the corresponding section (s. 52) of the Uniform Sales Act is to the same effect, except that clause (b) reads as follows:

> (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

If the property in the goods which are the subject of a contract of sale has passed to the buyer, the unpaid seller may have a lien or right of stoppage in transitu and a right of re-sale. These are rights conferred by law, in certain circumstances, upon the seller in respect of goods of which he has ceased to be the owner. The validity of the title which he purports to give to a third party upon the re-sale

of the goods will, as a rule, depend upon his right to re-sell, but, on the principle of estoppel discussed in chapter 3, §§ 44 ff., and in the cases mentioned in this chapter, the seller in possession of goods may in some circumstances confer a good title upon a third person whether or not the seller, in re-selling, is acting in breach of his contract with the original buyer.

If the property in the goods has not passed to the buyer, the seller cannot have a lien, because the goods are his own, but he can withhold or stop delivery, and re-sell. When he withholds or stops delivery, or re-sells, he does so as owner of the goods, and his ownership is sufficient warrant for his action as regards the goods and any third party to whom he sells, notwithstanding that his action is in breach of his contract with the original buyer. In order, however, that his action may be justified as regards the original buyer, the circumstances must be such that, if the property had passed, he would have had a lien or a right to stop delivery, and re-sell. In other words the seller's right to withhold or stop delivery of his own goods are, as regards the original buyer, co-extensive with his lien upon, or right of stopping delivery of, goods which have become the property of the buyer.

The Sale of Goods Act (Ont. s. 39; U.K. s. 39) provides:

> **39.**—(1) Subject to the provision of this Act and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—
>
> (a) a lien on the goods or right to retain them for the price while he is in possession of them;
>
> (b) in case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;
>
> (c) a right of re-sale as limited by this Act;
>
> (2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with the rights of lien and stoppage in transitu where the property has passed to the buyer.

In the United States the corresponding section (s. 53) of the Uniform Sales Act is to the same effect, except that in sub-s. 1 clause (d) is added as follows:

(d) a right to rescind the sale as limited by this Act.

As to the seller's lien or right of retention, see § 73. As to stoppage in transitu, see § 74. As to re-sale or pledge by the buyer, see § 75. As to re-sale by the seller, or, in the United States, recission by the seller, see § 76.

§ 73. Seller's lien or right of retention.

The particular circumstances in which an "unpaid seller" (as defined in the provision of the statute already quoted) is justified in withholding delivery are defined by the sections of the statute about to be quoted. It will be observed that in these sections the words "right of retention"—borrowed from Scottish law—occur as an alternative of "lien"—a technical term of English law. It happens not only that the words "right of retention" are more intelligible to the average layman than the English term—a happy quality which is rare, in the case of Scottish law terms—but also that the sections in which these words occur are rendered more accurate by their insertion. In so far as these sections authorize a seller to withhold delivery of goods of which he is still the owner, the words "right of retention" alone are appropriate. A man cannot, strictly speaking, have a "lien" upon his goods, but he may have a "right of retention." After the property has passed, either term is appropriate.

A lien is a mere personal right of retention, and is therefore dependent upon possession, as contrasted with a pledgee's special property in goods pledged—a special property which may be transferred to a third person subject to the pledgor's rights. A lien comes to an end with the destruction of the goods, and, apart from contract, does not attach to insurance upon the goods.

Sweet v. Pym, 1800, 1 East 4, 16 R.C. 142; Donald v. Suckling, 1866, L.R. 1 Q.B. 585, at p. 612, 21 R.C. 301, at p. 327; Halliday v. Holgate, 1868, L.R. 3 Ex. 299, at pp. 302, 303; Chew v. Traders' Bank of Canada, 1909, 19 O.L.R. 74.

The Sale of Goods Act (Ont. s. 40; U.K. s. 41) provides:

> **40.**—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:
>
> (a) where the goods have been sold without any stipulation as to credit;
>
> (b) where the goods have been sold on credit but the term of credit has expired;
>
> (c) where the buyer becomes insolvent.
>
> (2) The seller may exercise his right of lien notwithstanding that he is in possession of goods as agent or bailee for the buyer.

Sub-s. 1 expresses in another form the principle stated in s. 28 of the Sale of Goods Act, namely, that unless it is otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. If the contract is for the sale of goods on credit, the buyer is as a rule entitled to delivery before payment, but not in the case of his insolvency. See chapter 6, § 61.

The Sale of Goods Act (Ont. s. 2; U.K. s. 62) provides:

> A person shall be deemed to be insolvent within the meaning of this Act, who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due.

In the United Kingdom the following words are added:

> whether he has committed an act of bankruptcy or not and whether he has become a notour bankrupt or not.

Sub-s. 2 as originally drofted by Chalmers was confined to the case where the buyer was insolvent, in accordance with the law prevailing prior to the statute. At common law the lien was not exercisable after an attornment by the seller to the buyer if the buyer was merely in default, being solvent.

> Cusack v. Robinson, 1861, 1 B. & S. 299, at p. 308; Grice v. Richardson, 1877, 3 App. Cas. 319; Chalmers, Sale of Goods, 7th ed. 1910, pp. 101, 104; 25 Halsbury, Laws of England, p. 243, note (d); Willis, Sale of Goods, pp. 94 ff. As to the possible effect of the amend-

ment upon the law with regard to "actual receipt" under the Statute of Frauds, see chapter 2, § 26.

The Sale of Goods Act (Ont. s. 41; U.K. s. 42) provides:

> **41.** Where an unpaid seller has made part delivery of the goods he may exercise his right of lien or retention on the remainder unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

In Kemp v. Falk, 1882, 7 App. Cas. 573, at p. 586, 23 R.C. 399, at p. 404, Lord Blackburn, after referring to Dixon v. Yates, 1833, 5 B. & Ad. 313, 23 R.C. 385, said:

> The rule I had always understood, from that time down to the present, to be that the delivery of a part may be a delivery of the whole if this is so intended, but that it is not such a delivery unless it is intended, and I rather think that the onus is upon those who say that it was so intended.

The Sale of Goods Act (Ont. s. 42; U.K. s. 43) provides:

> **42.**—(1) The unpaid seller of goods loses his lien or right of retention thereon—
>
> (a) when he delivers the goods to a common carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
>
> (b) when the buyer or his agent lawfully obtains possession of the goods;
>
> (c) by waiver thereof.
>
> (2) The unpaid seller of goods having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment for the price of the goods.

As to reservation of the right of disposal, see chapter 3, § 38.

§ 74. Stoppage in transitu.

A lien depends upon possession and may be asserted if the buyer is in default, though solvent. On the other hand a right of stoppage in transitu can arise only after the seller has parted with possession and can be exercised only if the buyer is insolvent. The history of the right of stoppage in

transitu and the extent of the right itself are fully discussed in the judgments in Booth Steamship Co. v. Cargo Fleet Iron Co. [1916] 2 K.B. 570. Scrutton J., at p. 597, said:

> The right of stoppage in transitu came into the English law in the seventeenth century from the custom of merchants, both English and foreign—a custom, therefore, which had grown up with no special reference or congruity to the English law. As it enabled an unpaid vendor whose purchaser. was insolvent to exercise some control over goods in which he had no property and of which he had no possession, while in the hands of a shipowner with whom he had no contract, and to prevent that shipowner from performing a contract to which the unpaid vendor was no party, it was obvious there would be considerable difficulty in fitting in this international usage and the national law. As Lord Abinger says, in the well-known judgment in Gibson v. Carruthers, 1841, 8 M. & W. 321, at pp. 338, 339, 340, "In Courts of Equity it has been a received opinion that it was founded on some principle of common law. In Courts of Law it is just as much the practice to call it a principle of equity, which the common law has adopted . . Many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contract, as it prevails in this country between vendor and vendee . . ." And, again, he refers to "the reasoning and dicta by which it has been attempted, not very successfully, to develop the principle, and to make it conformable in appearance and dress . . with the family of English law into which it has been adopted."

The right of stoppage in transitu is the right of the unpaid seller, on discovery of the insolvency of the buyer, and notwithstanding that he has made constructive delivery of the goods to the buyer, to resume possession of them, if he can, while they are in course of transit and before they come into the actual possession of the buyer. The Sale of Goods Act contains various provisions as to the duration of the transit, as to the manner in which the seller may exer-

cise his right of stoppage in transitu, and as to the effect of the exercise of the right. As to re-sale by the seller, see § 76. If the property in the goods has not passed to the buyer, or if the seller has reserved the right of disposal, the seller's control over the goods depends upon his ownership or his right of disposal, and the question of stoppage in transitu does not, strictly speaking, arise. As to the reservation of the right of disposal, see chapter 3, § 38.

The Sale of Goods Act (Ont. s. 43; U.K. s. 44) provides:

> **43.** Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods, has the right of stopping them in transitu, that is to say he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

In the United States the Uniform Sales Act provides:

> **57.** Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

The insertion in the Uniform Sales Act of the words "is or" before "becomes" is intended to make it clear that the buyer's right exists even though the buyer was insolvent at the time of the contract. The concluding words are intended to cover not only the right of re-sale which the seller has under the Sale of Goods Act as well as the Uniform Sales Act, but also the right to rescind which he has under the Uniform Sales Act.

The Sale of Goods Act (Ont. s. 44; U.K. s. 45) provides:

> **44.**—(1) Goods are deemed to be in course of transit from the time when they are delivered to a common carrier by land or water or other bailee, for the purpose of transmission to the buyer, until the buyer

or his agent in that behalf takes delivery of them from such common carrier or other bailee.

(2) If the buyer or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the common carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the common carrier or other bailee continues in possession of them, the transit is not deemed to be at an end even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a common carrier, or as agent to the buyer.

(6) Where the common carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transitu unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

In the Ontario statute the word "common," which does not occur in the original statute, has been inserted before the word "carrier." The object of the change is not obvious, as the meaning of the section appears to be unchanged.

In the United States the corresponding section of the Uniform Sales Act is to the same effect, but the various provisions have been re-arranged.

As to questions regarding the duration of the transit, now provided for by this section of the Sale of Goods Act, see Ellis v. Hunt, 1789, 3 T.R. 464, 23 R.C. 416; Bird v. Brown, 1850, 4 Exch. 786, 23 R.C. 422; London & North Western Ry. Co. v. Bartlett, 1861, 7 H. & N. 400, 23 R.C. 434; Chalmers, Sale of Goods, 7th ed. 1910, pp. 106 ff.; 25 Halsbury, Laws of England, pp. 248 ff.

The Sale of Goods Act (Ont. s. 45; U.K. s. 46) provides:

45.—(1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods or by giving notice of his claim to the common carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the common carrier or other bailee in possession of the goods, he must re-deliver the goods to or according to the directions of the seller. The expenses of such re-delivery must be borne by the seller.

In accordance with the law prevailing prior to the statute, this section authorizes the seller to exercise the right of stoppage in either one of two ways, namely, by taking actual possession, or by giving notice to the carrier, the latter alternative being a relaxation of the old rule requiring actual possession to be taken. The effect of the notice is to give the seller the right to possession of the goods. He is not entitled to require the carrier to interrupt the transit, but he is entitled to prevent delivery to the buyer at the contractual place of delivery and to require delivery to himself.

Booth Steamship Co. v. Cargo Fleet Iron Co., [1916] 2 K.B. 570; as to notice to the "principal" instead no-

tice to the person in actual possession of the goods, see Litt v. Cowley, 1816, 7 Taunt. 169, 23 R.C. 411; Whitehead v. Anderson, 1842, 9 M. & W. 518; Kemp v. Falk, 1882, 7 App. Cas. 573, 23 R.C. 399.

The seller, having by exercising his right of stoppage in transitu prevented delivery to the buyer, is under an obligation to take delivery himself, or give directions for delivery, and in order to obtain delivery he must discharge any lien which the carrier has for particular charges or freight on the goods in question (including not merely a common law lien for freight on delivery, but also a contractual lien for advance freight), but he need not discharge any general lien which the carrier has by contract or usage for other sums owing by the buyer but not due in respect of the particular goods. The seller may withdraw the stop and release the goods before the end of the transit, and thus discharge himself from the obligation of taking delivery, but if he does not withdraw the stop he will be liable to the carrier for damages for the failure to take delivery and these damages may be equivalent in amount to the freight.

Booth Steamship Co. v. Cargo Fleet Iron Co., supra; United States Steel Products Co. v. Great Western Ry. Co., [1916] 1 A.C. 189.

In the United States the corresponding section of the Uniform Sales Act (s. 59) contains the following additional provision in sub-s. 2:

> If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

§ 75. Sale or pledge by buyer.

The general rule is that the buyer cannot defeat the seller's right of lien or retention or stoppage in transitu by selling or pledging the goods, but the rule is subject to exception in favour of a third person who in good faith and

for value takes a transfer of a document of title to the goods.

As to the meaning of "document of title," and as to the effect of the transfer of such a document, see chapter 4, § 43.

The Sale of Goods Act (Ont. s. 46; U.K. s. 47) provides:

> **46.** Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Provided that, where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

In the United Kingdom the subject matter of this section is also covered in part by the following section of the Factors Act, 1889, which has been omitted from the Factors Act in Ontario (see chapter 4, § 46):

> **10.** Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

As to the effect upon the seller's right of stoppage in transitu of the transfer by the buyer to a third person of a bill of lading, see Lickbarrow v. Mason, 1793, 6 East 21 n., 1 Smith, L.C. 12th ed. 1915, p. 726, 4 R.C. 756; In re Westzin-

thus, 1833, 5 B. & Ad. 817, 4 R.C. 845; Leask v. Scott, 1877, 2 Q.B.D. 376, 4 R.C. 790; Ex parte Golding Davis & Co., 1880, 13 Ch. D. 628, 4 R.C. 851; Kemp v. Falk, 1882, 7 App. Cas. 573, 23 R.C. 399. See also Cahn v. Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q.B. 643, in chapter 4, § 44.

With regard to stoppage in transitu the proviso to the section of the Sale of Goods Act above quoted (Ont. s. 46; U.K. s. 47) adopts the rule of the common law declared in Lickbarrow v. Mason, supra, and extends it so as to make it applicable to the transfer by the buyer of documents of title other than bills of lading. With regard to lien, it applies the same extended rule, a lien not being lost at common law, as against a buyer or sub-buyer or other transferee, by the issue or transfer of any document but a bill of lading, that being the only document which *per se* transferred possession.

25 Halsbury, Laws of England, p. 260, note (o). It is there further pointed out that some difficulty arises in the interpretation of the words "subject to the rights of the transferee" in the case of a pledge by the buyer or owner of a document of title for an antecedent debt, in view of the provision of the Factors Act (Ont. s. 5; U.K. s. 4: see chapter 4, § 46), and the opinion is expressed that the section of the Factors Act should be read as a second proviso to the section of the Sale of Goods Act.

A delivery order was issued by the owner of goods and delivered by him to another person, who in turn transferred it to a third person who took it in good faith for value. It was held that the delivery order was a document of title and that the unpaid vendor's lien of the original owner was defeated.

Ant. Jurgens Margarinefabrieken v. Dreyfus, [1914] 3 K.B. 40.

In the United States the Uniform Sales Act provides:

62. Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

As to the negotiation of a negotiable document of title, see chapter 4, §47.

§ 76. Re-sale by unpaid seller.

If the property in goods has not passed from the seller to the buyer, the seller can of course re-sell and give a good title to the goods to a third person, whether or not the seller's action in re-selling is in breach of his contract with the seller. If the property has passed to the buyer under the original contract, the seller cannot as a matter of course confer a good title upon a third person, but he may by virtue of his contract have the right to re-sell, or he may by statute or otherwise have the power to give a good title to a third person upon a re-sale.

The Sale of Goods Act (Ont. s. 47; U.K. 48) provides:

47.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu, re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not, within a reasonable time, pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on

the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

The subject of re-sale at common law and under the Sale of Goods Act is discussed in Benjamin, 5th ed. 1906, pp. 932 ff. At pp. 951-2, it is said, by way of introduction to the discussion of the meaning of sub-ss. 3 and 4:

> It has already been suggested that the true construction of s. 48 (1) [Ont. s. 47 (1)] is one consonant with the common law, and that under its provisions the mere fact that the seller holds the goods under his right of lien, that is to say, adversely to the buyer, or has stopped them in transitu, does not rescind the contract. In other words, the mere fact that the buyer has failed to pay or is insolvent does not entitle the seller to rescind the contract. Sub-s. 2, however, declares that in such circumstances the seller may pass a good title to a second buyer; but it leaves untouched any remedy the first buyer may possess in respect of the re-sale. As against the second buyer he has none, for he cannot sue him for trespass, or for conversion, or (as after tender he could at common law) for the detention of the goods, for the second buyer has a statutory title; nor can he sue the seller for trespass or conversion, as he is not entitled to the possession. But under this sub-section, as at common law, if the buyer, within the time allowed, was ready and willing to accept and pay for the goods, he can after a re-sale sue the seller for non-delivery; or if within such time he tenders the price and demands the goods, he can sue the seller for their detention, it being no defence in the latter action to say that the defendant has parted with the possession of the goods. Sub-s. 3 declares in what circumstances the seller may by law re-sell the goods. Sub-s. 4 declares the effect of a re-sale under an express power. The provisions of sub-ss. 3 and 4 give rise to very difficult questions of construction.

As to re-sale, see also 25 Halsbury, Laws of England, pp. 263 ff.; Booth Steamship Co. v. Cargo Fleet Iron Co. [1916] 2

K.B. 570, at pp. 581, 598 ff.; McGregor v. Whalen, 1914, 31 O.L.R. 543, 20 D.L.R. 489.

In the United States the Uniform Sales Act provides:

60.—(1) Where the goods are of a perishable nature, or where the seller expressly reserves the right of re-sale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may re-sell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such re-sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) Where a re-sale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3) It is not essential to the validity of a re-sale that notice of an intention to re-sell the goods be given by the seller to the original buyer. But where the right to re-sell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the re-sale was made.

(4) It is not essential to the validity of a re-sale that notice of the time and place of such re-sale should be given by the seller to the original buyer.

(5) The seller is bound to exercise reasonable care and judgment in making a re-sale, and subject to this requirement may make a re-sale either by public or private sale.

61.—(1) An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unrea-

sonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of recission was asserted.

CHAPTER VIII.

ACTIONS FOR BREACH OF THE CONTRACT.

§ 81. Action for the price.

The rights of the seller enforceable by action against the buyer are personal rights as contrasted with the real rights of an unpaid seller discussed in chapter 7.

In some circumstances the seller may have a right of action for the price of the goods sold, in other circumstances he may have merely a right of action for damages.

As to damages, see § 82.

As to interest or special damages, see § 86.

Action includes counter-claim and set-off. See chapter 9.

Before the Judicature Acts the price of goods sold could be recovered under the common *indebitatus* counts. The count for goods sold and delivered was applicable when the property had passed and the goods had been delivered to the buyer, and the price was payable at the time of action brought. The count for goods bargained and sold was applicable when the property had passed to the buyer and the contract had been completed in all respects except delivery, and the delivery was not a condition precedent to the payment of the price. Now it is sufficient to show facts disclosing either cause of action.

Chalmers, Sale of Goods, 7th ed. 1910, p. 118; cf. 25 Halsbury, Laws of England, p. 121, note (a).

In order that the seller should be entitled to recover the price he must, as a general rule, and unless otherwise agreed, show that the buyer has received what he bargained for.

In other words, the property in the goods must have passed, delivery must have been made or tendered, if delivery was a condition precedent to payment, and the period of credit, if any, must have expired.

Mason & Risch v. Christner, 1918, 44 O.L.R. 146, 46 D.L.R. 710, S.C., 1920, 47 O.L.R 52, 48 O.L.R. 8, 54 D. L.R. 653; Geddes v. American National Red Cross 1920, 47 O.L.R. 163, 52 D.L.R. 547, S.C., reversed by the Supreme Court of Canada, 12th October, 1920; 25 Halsbury, Laws of England, pp. 266-7.

As to the general rule that payment and delivery are concurrent conditions, see chapter 6, § 61. As to the passing of the property from seller to buyer, see chapter 3.

Where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, the breach by the buyer of his promise to accept and pay can affect the seller only by way of damages. The goods are still his. He may sell or not at his pleasure. But his only action against the buyer [as a general rule] is for damages for non-acceptance. He can in general recover only the damage that he has sustained, not the full price of the goods.

Benjamin, Sale, 5th ed., 1906, p. 805; Mason & Risch v. Christner, *supra*; cf. Vipond v. Sisco, 1913, 29 O.L.R. 200, 14 D.L.R. 129.

The parties may, however, agree that notwithstanding delivery the property in the goods shall not pass until payment in full; and that the price shall be payable in instalments or otherwise without regard to the passing of the property. In that event the case is taken out of the general rule which prevents a seller from recovering the price where he has not parted with the property in the goods, and after delivery is made or tendered the seller may recover the price in accordance with the contract.

Tufts v. Poness, 1900, 32 O.R. 51; Mason & Risch v. Christner, *supra.*

Again, the parties may agree that the price shall be payable on a day certain irrespective of delivery, and in that

case an action will lie for the price if the day for payment has passed and the buyer wrongfully neglects or refuses to pay. In the absence of an agreement of this kind, the seller must in an action for the price prove that delivery of specific goods has been made or tendered. It follows that in the case of a contract for the sale of goods to be manufactured, the seller is not entitled to sue for the price until specific goods have been appropriated to the contract.

Mason & Risch, v. Christner, *supra*; as to the appropriation of goods to the contract, see chapter 3, § 37.

The Sale of Goods Act (Ont. s. 48; U.K. s. 49) provides:

48.—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where under a contract of sale, the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price although the property in the goods has not passed, and the goods have not been appropriated to the contract.

In the United Kingdom the Sale of Goods Act further provides:

49.—(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

As to interest, see also § 86.

In the United States the Uniform Sales Act (s. 63) provides:

63.—(1) Where under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable [see § 82, *infra*], the seller may offer to deliver the goods to the buyer, and if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

§ 82. Damages for non-acceptance.

Under the provision of the Sale of Goods Act last quoted (Ont. s. 48, sub-s. 2; U.K. s. 49, sub-s. 2), if the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price, the seller may sue for the price notwithstanding that the property has not passed to the buyer, but in other cases, if the property has not passed, the seller may sue only for damages for non-acceptance. If the property has passed and the buyer wrongfully neglects or refuses to pay, the seller, it seems, may sue either for the price or for damages for non-acceptance, in which latter case his conduct amounts to an election to treat the buyer's conduct as a repudiation of the contract.

See 25 Halsbury, Laws of England, pp. 266, note (i), 267, note (m).

The Sale of Goods Act (Ont. s. 49; U.K. s. 50) provides:

49.—(1) Where the buyer wrongfully neglects or

refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

As to what is meant by the time being "fixed" under sub-s. 3, compare the parallel provision of the next following section, relating to damages for non-delivery, and the decisions with regard to it, referred to in § 83.

The parties' obligations to deliver goods and to accept and pay for them under a contract may be discharged by a mutual agreement to substitute for that contract a new contract, notwithstanding that the new contract is unenforceable by reason of the Statute of Frauds. See Morris v. Baron, [1918] A.C. 1: chapter 2, § 25. But the courts have always recognized "the distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another," and will not regard the latter as affecting the rights of the parties further than this, that if a man asks to have performance of his contract postponed, he does so at his own risk. For if the market value of the goods which he should have accepted at the earlier date has altered at the latter date, the rate of damages may be assessed, as against him, either at the time when the performance should have taken place, and and when by non-performance the contract was broken, or when he ultimately exhausted the patience of the seller, and definitely refused to perform the contract.

Anson, Contract, 15th ed. 1920, p. 337, citing Hickman v. Haynes, 1875, L.R. 10 C.P. 606, and Ogle v. Earl Vane, 1867, L.R. 2 Q.B. 275, 3 Q.B. 272.

The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract, and the court has no power to add a penalty. If therefore the buyer has paid a sum of money to the seller by way of deposit, the buyer is entitled to the return of it (less the amount for which he is liable for breach of contract) unless the parties have agreed that the deposit shall belong to the seller in the event of the buyer's failure to perform the contract.

Brown v. Walsh, 1919, 45 O.L.R. 646.

In Mason & Risch v. Christner, 1920, 47 O.L.R. 52, at pp. 53, 54, (judgment varied, 48 O.L.R. 8, 54 D.L.R. 653) Middleton J. says:

> The fundamental principle in all cases of breach of contract is that, so far as money can do it, the other party to the contract shall be placed in as good a situation as if the contract had been performed, this principle being subject to the qualification that the plaintiff has cast upon him the obligation of taking all reasonable steps to mitigate his loss consequent upon the breach. If authority is needed, it is found in British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railway Co. [1912] A.C. 673, and Payzu v. Saunders, [1919] 2 K.B. 581. The rule relied upon by the defendant, found in many cases, that the damage in the case of refusal to accept goods is the difference between the contract price and the market price, is merely an example of the working out of this principle. If goods can be sold on the open market, the vendor's duty is to offer for sale, and so mitigate his damage; but this rule has no application to cases in which there is not an open market for the goods. A dealer having a quantity of grain can always sell it upon the open market, and it makes no difference to him who buys. The thing of importance is the difference between the price the defendant agreed to give him and the price he thus obtains.
>
> Where the article sold is a machine or a piano, and there is no such thing as an open market ready to ab-

sorb all that is cast upon it, but only a limited number of purchasers exist, the case is obviously widely different. The vendor has his store maintained at large expense, and his salesmen to whom he pays wages, and is under large expense for advertising his wares. He may have a hundred pianos to sell, and, when a contract is made to buy, the profit, so-called, goes to meet *pro tanto* this overhead expense before his ultimate net profit can be ascertained. When this contract is broken, it is no answer to say, "You can sell your piano at the same price, and so have suffered no damage." If the contract had not been broken, a second piano would have been sold, and the dealer would have had the profit on two sales instead of one.

The existence of the open market ready to absorb all that can be fed to it is the true test. As put by James L.J. in Dunkirk Colliery Co. v. Lever, 1878, 9 Ch. D. 20, at p. 25, "What I understand by a market in such a case as this is, that when the defendant refused to take the [coal in question] the plaintiffs might have sent it in waggons somewhere else, where they could sell it, just as they sell corn on the Exchange, or cotton at Liverpool . . . That is my notion of a market under those circumstances. There being no market . . what the plaintiffs are entitled to is the full amount of the damage which they have really sustained by the breach of the contract."

In the case of goods to be manufactured specially for the buyer, it is possible that they may be of no use to anyone but the buyer. In that case, if after the completion of the goods, the buyer refuses to accept and pay for them, the only way to put the seller in the same position as if the contract had been performed is to give him the whole price of the goods, and not merely the amount of the profit he would have made. If the buyer, by altering the goods, is able to re-sell them to another buyer, he is still entitled to recover from the first buyer the amount of the profit which he would have made upon the first sale, and not merely the cost of altering the goods, unless the first buyer proves that

the seller could not have filled the orders of both buyers. In the case of goods which have not been manufactured when the buyer repudiates the contract, the seller is entitled to recover the amount of the profit which he would have made if the goods had been manufactured, delivered and paid for.

In re Vic Mill, [1913] 1 Ch. 183, 465; cf. Brunswicke Balke Collender Co. v. Falsetto, 1915, 34 O.L.R. 386, 25 D.L.R. 848; Consolidated Plate Glass Co. v. McKinnon Dash Co., 1917, 41 O.L.R. 188, 40 D.L.R. 47.

In the United States the Uniform Sales Act provides.

64.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

65. Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

§83. Damages for non-delivery.

The buyer's proprietary remedies have been referred to in chapter 7, § 71. It remains to discuss the buyer's remedies by way of action for damages. Action includes counterclaim or set off. See chapter 9.

The Sale of Goods Act (Ont. s. 50; U. K. s. 51) provides:

50.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

As to the measure of damages where there is no available market, and as to special damages, see § 86. As to what is meant by an available market in the case of non-acceptance of goods, see § 82.

If the time for delivery is fixed by reference to the happening of an event, it is fixed within the meaning of sub-s. 3. On the other hand, if the contract provides for delivery within a reasonable time after a future date, it is not a contract for delivery at a fixed time within the meaning of the sub-section. In any event the provision of sub-s. 3 that the damages are to be ascertained with reference to the market or current price at the time of the refusal to deliver does not apply to a case where the breach is an anticipatory breach. If, for in-

stance, the seller repudiates the contract before the time at which the goods ought to have been delivered, the buyer, without buying against the seller, may bring his action at once, but if he does so, his damages must be assessed with reference to the market price of the goods at the time at which they ought to have been delivered under the contract. If the action comes on for trial before the contractual date for delivery has arrived, the court must arrive at the price as best it can. The buyer must, however, do what is reasonable to mitigate the damages, and if the seller can show that the buyer acted unreasonably in not buying against him, the date to be taken is the date at which the buyer ought to have gone into the market to mitigate the damages.

Melachrino v. Nickoll, [1920] 1 K.B. 693; Millett v. Van Heek & Co., [1920] 3 K.B. 535; Morrow Cereal Co. v. Ogilvie Flour Mills Co., 1918, 57 Can. S.C.R. 403, 44 D.L.R. 557, reversing, in part, Ogilvie v. Morrow, 1917, 41 O.L.R. 58, 39 D.L.R. 463; see also Brown v. Muller, 1872, L.R. 7 Ex. 319, 23 R.C. 527; Roper v. Johnson, 1873, L.R. 8 C.P. 167, 23 R.C. 532; Dominion Radiator Co. v. Steel Co., 1918, 43 O.L.R. 356.

The provision of sub-s. 3, that the measure of damages is to be ascertained with reference to the market or current price at the time when the goods ought to have been delivered, is inapplicable where the price has been prepaid. In such case, if the market price is higher at the time of trial than at the time specified for delivery, the damages are to be ascertained with reference to the price at the time of trial.

Peebles v. Pfeifer, 1918, 11 Sask. L.R. 249, citing 25 Halsbury, Laws of England, p. 271.

In the case of a c.i.f. contract the delivery contemplated is a constructive delivery of the goods by tender of the invoice, insurance policy and bill of lading as soon as possible after shipment of the goods, and the time for delivery within the meaning of sub-s. 3 is therefore the date at which these documents, if sent forward with reasonable despatch, should have reached the buyer, not the date at which the goods themselves should have arrived.

Sharpe v. Nosawa, [1917] 2 K.B. 814. As to c.i.f. contracts, see also chapter 6, § 61.

A contract for the sale of goods by the defendant to the plaintiffs provided for delivery as required during a period of nine months, payment for each instalment to be made within one month of delivery less 2½% discount. The plaintiffs failed to make punctual payment for the first instalment, and the defendant, in the erroneous belief that the plaintiffs' failure to pay was due to their lack of means, refused to deliver any more of the goods under the contract, but offered to deliver the goods at the contract price if the plaintiffs would agree to pay cash at the time of the orders. The plaintiffs did not accept this offer, and, the market price of the goods having risen, brought an action against the defendant for breach of contract, claiming as damages the difference between the market price and the contract price. It was held that the question what steps a plaintiff in an action for breach of contract should take towards mitigating the damage is a question of fact and not of law, and that the plaintiffs should have mitigated their loss by accepting the defendant's offer, and that the damages recoverable were, not the difference between the market price and the contract price, but only such loss as the plaintiffs would have suffered if they had accepted the offer.

Payzu v. Saunders, [1919] 2 K. B. 581.

The following cases are examples of the application of the rule that the measure of damages is the difference between the contract price and the market price at the date of the breach:

Brenner v. Consumers Metal Co., 1917, 41 O.L.R. 534, 41 D.L.R. 339.

Petrie v. Rae, 1919, 46 O.L.R. 19.

Schmidt v. Wilson & Canham, 1920, 48 O.L.R. 257, 55 D.L.R. 516.

In Di Ferdinando v. Simon, Smits & Co., [1920] 3 K.B. 409, at pp. 414-5 Scrutton L. J. said:

> When a plaintiff claims damages for breach of contract to deliver goods in a foreign country at a fixed date, the measure of damages is, if there is a market, the market value of those goods at the place where and on the day

when they should have been delivered; and it is immaterial to prove that at the date of the judgment awarding the damages the goods were either worth more or worth less than they were at the date of the breach. If the goods were worth £50 a ton on the day for delivery, it would be irrelevant to prove that they were worth £100 a ton on the day of the judgment. The reason for excluding that evidence is that subsequent fluctuations in value of the goods which ought to have been delivered are too remote as a consequence of the original breach, to be taken into account by the court. Therefore, shutting out the change in the value of the goods after the date of the breach, if the damages have to be assessed in the currency of a foreign country, the court has to arrive at a figure expressed in foreign currency. An English court, however, cannot give judgment in foreign currency, there being no power to enforce such judgment. Therefore the court must translate into English currency the figure arrived at as the damages in foreign currency on the date of the breach. Just as the court has to exclude from the calculation of the damages the subsequent change in the value of the goods after the date of the breach, so it has to exclude the subsequent change in the value of the currency after the date of the breach; and for the same reason—namely, that the changes in the value of the currency are too remote a consequence of the breach to be taken into consideration by the court.

Di Ferdinando v. Simon, from which the foregoing passage is quoted, was a case of breach of contract for the carriage of goods and conversion. The same rule, namely, that the value of foreign currency is to be estimated as of the date of the breach, not as of the date of the judgment, had previously been applied, in the case of a sale of goods. See Barry v. Van den Hurk, [1920] 2 K.B. 709; Lebeaupin v. Crispin, [1920] 2 K.B. 714. On the other hand, see Kirsch v. Allen Harding & Co., 1919, 89 L.J. K.B. 265, and the editorial opinion in its favour expressed in 37 Law Quarterly Review, p. 7 (Jan. 1921). The cases are reviewed in an article in the same volume at pp. 38 ff. Another case since reported is The Volturno, [1920] P. 447.

In Slater v. Hoyle & Smith, [1920] 2 K.B. 11, at pp. 20 ff., Scrutton L.J., said:

> It is well settled that damages for non-delivery of goods, where there is a market price, do not include damages for the loss of any particular contract unless that contract has been in contemplation of the parties to the original contract: Horne v. Midland Ry Co., 1873, L.R. 8 C.P. 131. The value of the goods in the market independently of any circumstances peculiar to the plaintiff is to be taken: Great Western Ry. Co. v. Redmayne, 1866, L.R. 1 C.P. 329; Williams v. Reynolds, 1865, 6 B. & S. 495, 505. If the plaintiff has a profitable contract to sell goods, and there is a market, he can supply himself with the goods by purchasing in the market, and he is then left without the goods he should have received under the original contract and has lost their market value.
>
> But suppose his sub-contract is at a price below instead of above the market price, so that, if he delivers goods under the sub-contract, he loses. Can his damages be limited by the amount he would have received on the sub-contract? On the above reasoning it would seem not. He could supply the sub-contract by buying in the market and then should have goods delivered to him of a certain market value, which he has lost because they were not delivered. This has been decided in the case of non-delivery of goods by the Court of Appeal in Rodocanachi v. Milburn, 1886, 18 Q.B.D. 67, and by the House of Lords in Williams v. Agius, [1914] A.C. 510, where Rodocanachi v. Milburn was approved.

In subsequent passages of his judgment in Slater v. Hoyle & Smith, Scrutton, L.J., expressed the opinion that the same principles should apply in the case of delay in delivery, that is, that the buyer should not be limited in his damages by the amount he would have received under the sub-contract, notwithstanding the decision of the Privy Council to the contrary in the case of Wertheim v. Chicoutimi Pulp Co., [1911] A.C. 301. The case of Slater v. Hoyle & Smith was, however, one of breach of warranty, and the question actually requiring decision is stated in § 85.

The parties may by their contract assess in advance the amount of the damages to be paid for non-delivery, if the amount fixed is reasonable, and is payable in respect of the breach of a single stipulation (as contrasted with the breach of any one of several stipuations, some more and some less important), or is graduated according to the extent of the breach or according to the time during which default continues.

Pelee Island Navigation Co. v. Doty Engine Works Co., 1911, 23 O.L.R. 402, and cases cited.

§ 84. Specific performance.

The general rule is that the court will not grant specific performance of contracts relating to personalty—not because of any difference between real and personal property, but because usually damages will be an adequate remedy. If, therefore, the contract is for the sale of a specific chattel, and damages will not be an adequate remedy, specific performance may be enforced. The cases are collected in the notes in 2 White & Tudor's Leading Cases, 8th ed., 1912, pp. 428 ff., to the case of Cuddee v. Rutter, 1720, 5 Vin. Abr. 538, pl. 21, 6 R.C. 640.

In Ontario the Sale of Goods Act provides:

51. In any action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages, and may impose such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just.

In the United Kingdom the Sale of Goods Act provides:

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional or upon such terms and conditions as to damages, payment of the price, and otherwise,

as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

In Scotland specific performance, or, as it is called, specific implement, is an ordinary not an an extraordinary remedy, and it can be demanded as of right wherever it is practicable.

Chalmers, Sale of Goods, 7th ed., 1910, p. 126, citing Stewart v. Kennedy, 1890, 15 App. Cas. 75, at pp. 102,105.

The Sale of Goods Act confers on the court the power of enforcing at the instance of a buyer specific performance of a contract for the sale of specific or ascertained goods, whether or not the property has passed by the contract.

Jones v. Tankerville, [1909] 2 Ch. 440, at p. 445; as to what is meant by specific or ascertained goods, see chapter 3, § 33.

§85. Damages for breach of warranty.

The remedies for breach of condition and breach of warranty have been discussed in chapter 5, §54. Under the statutory provisions there referred to, in case of breach of condition the buyer may elect to treat the breach of condition as merely a breach of warranty, and in certain circumstances he is obliged to do so.

The Sale of Goods Act (Ont. s. 52; U. K. s. 53) provides:

52.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or

(*b*) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

'Quality'' of goods is defined (Ont. s. 2; U. K. s. 62) as including their state or condition.

In the United States, as has been pointed out in chapter 5, rescission is allowed as an alternative remedy in case of breach of warranty, and the Uniform Sales Act contains provisions materially different from those of the Sale of Goods Act. As regards the measure of damages, however, the two statutes are not substantially dissimilar. The Uniform Sales Act (s. 69) provides:

69.—(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances, showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

The abatement in price to be allowed to the buyer is the amount by which the value of the goods is reduced by reason of the breach of warranty: Mondel v. Steel, 1841, 8 M. & W. 858. It is the actual reduction in value which must be considered, not an estimate made by either party, and the price obtainable for the goods is strong, though not necessarily conclusive, evidence of the actual value. Damages may be given to the buyer for the liability which he has

incurred by selling the goods on the same warranty as that on which he bought. Dingle v. Hare, 1859, 7 C.B. N.S. 145; Randall v. Raper, 1858, E. B. & E. 84.

Catalano v. Cuneo Fruit and Importing Co., 1919, 46 O.L.R. 160, 49 D.L.R. 610; cf. Wood v. Anderson, 1915, 33 O.L.R. 143.

Where there is a warranty, the buyer may, even after inspection, take possession of the goods and sell them, and nevertheless claim damages for breach of warranty. See chapter 6, § 66. The buyer owes a duty to the seller to inspect the goods at the place of delivery. The measure of damages is the difference between the actual value of the goods when delivered at that place and the value which they ought to have had, and in case of breach of warranty an ininspection of the goods will inform the plaintiff of their then quality and condition and enable him not only to ascertain their value when delivered, but also to discharge the obligation incumbent on him to mitigate the damages.

Merrill v. Waddell, 1920, 47 O.L.R. 572, 54 D.L.R. 18.

Manufacturers agreed to sell 3000 pieces of unbleached cotton cloth of a specified quality at a certain price to be delivered within a certain period. They delivered 1625 pieces of inferior quality. The buyers accepted and paid for these pieces but refused to take any further deliveries, and being sued by the manufacturers for non-acceptance of the remaining pieces, counter-claimed damages for breach of warranty of quality in relation to the 1625 pieces. The buyers had made a contract to deliver 2000 pieces of bleached cloth to third persons at a price per piece higher than the market price per piece of the 1625 pieces as delivered, and in fulfilment of that contract had actually delivered 691 of the 1625 pieces, and had received payment for them. It was held that this contract was not to be taken into account in measuring the damages.

Slater v. Hoyle & Smith, [1920] 2 K.B. 11, following Rodocanachi v. Milburn, 1886, 18 Q.B.D. 67, and Williams v. Agius, [1914] A.C. 510, and distinguishing

Wertheim v. Chicoutimi Pulp Co., [1911] A.C. 301. As to Slater v. Hoyle & Smith, see also § 83.

With regard to general damages, that is, the difference between the value of the thing contracted for and that of the thing supplied, the question whether the property has passed or not may be important. Until the property in goods has passed to the buyer, he is not entitled to sue for general damages for breach of warranty, for no one can be injured by a diminution in value, simply, of a chattel, until he owns it. Frye v. Milligan, 1885, 10 O. R. 509; Tomlinson v. Morris, 1886, 12 O.R. 311. If, however, the buyer is sued for the price, he may set up the diminution of value by way of set-off, whether the property has passed or not. Copeland v. Hamilton, 1893, 9 Man. R. 143; Cull v. Roberts, 1897, 28 O.R. 591; Crompton and Knowles Loom Works v. Hoffman, 1903, 5 O.L.R. 554. Again, although the buyer is not entitled to sue for general damages for breach of warranty until the property has passed, the fact that the property has not passed will not debar him from suing for special damages, for instance, for loss of profits. If a machine, the subject matter of the contract, will not do the work which it was warranted to be capable of doing, and the buyer claims damages for loss of profits, it is no answer for the seller to say that the machine does not belong to the buyer. The question of ownership is irrelevant to the buyer's claim. He is injured by the failure of the machine to do the work for which he wanted it, no matter who owns it. Jones v. Page, 1867, 15 L.T. N.S. 619; Fowler v. Lock, 1872-4, L.R. 7 C.P. 272, 9 C.P. 751n, 10 C.P. 90.

New Hamburg Mfg. Co. v. Webb, 1911, 23 O.L.R. 44, at pp. 48-51; cf. Dominion Paper Box Co. v. Crown Tailoring Co., 1918, 42 O.L.R. 249, 43 D.L.R. 557. As to special damages for breach of warranty, see also § 86.

§ 86. Interest or special damages.

The Sale of Goods Act (Ont. s. 53; U.K. s. 54) provides:

53. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special dam-

ages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

Of the so-called two rules in Hadley v. Baxendale, 1854, 9 Exch. 341, 2 Smith L.C., 12th ed. 1915, p. 534, 5 R.C. 502, the first is that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered . . arising naturally, i.e., according to the usual course of things, from such breach of contract itself." This rule was generally accepted prior to the passing of the Sale of Goods Act, and is expressed in the provision which occurs in various sections already quoted, namely, that the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of contract. See § § 82, 83 and 85. The second rule in Hadley v. Baxendale is that the damages should be "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." The words expressing the second rule have been subject to criticism in various cases. The rule was not adopted in the Sale of Goods Act, which leaves at large the right of the buyer or the seller to recover special damages, in any case where by law special damages may be recoverable.

Bostock v. Nicholson [1904] 1 K.B. 725, at pp. 735-6.

Criticism of the second rule in Hadley v. Baxendale is generally directed to the fact that the rule seems to say that the amount of damages depends on the mere knowledge on the part of the defendant of the special circumstances,

whereas it would perhaps be more accurate to say that "where the knowledge of the special circumstances forms the basis of the contract, or where from the facts of the case it can be inferred that the parties intended that it should do so, it becomes an implied term of the contract that what may be called the indirect or more remote damages, if any, resulting from such special circumstances, shall be paid for."

See notes to Hadley v. Baxendale in Smith L.C., 12th ed. 1915, pp. 554 ff.; British Columbia, etc., Co. v. Nettleship, 1868, L.R. 3 C.P. 499; Horne v. Midland Ry. Co., 1873, L.R. 8 C.P. 131, 5 R.C. 506.

As to the measure of damages for non-acceptance, see § 82. As to the measure of damages for non-delivery of goods where there is no available market, see Elbinger Actien-Gesellschafft v. Armstrong, 1874, L.R. 9 Q.B. 473, 23 R. C. 551; Hydraulic Engineering Co. v. McHaffie, 1878, 4 Q. B.D. 670, 23 R.C. 558; see also § 83.

As to damages for breach of warranty, see Smith v. Green, 1875, 1 C.P.D. 92, 23 R.C. 566; Cointat v. Myham, [1913] 2 K.B. 220; Steinacker v. Squire, 1913, 30 O.L.R. 149, 19 D.L.R. 434; Merrill v. Waddell, 1920, 47 O.L.R. 572, 54 D.L.R. 18; see also § 85.

In Ontario it is provided by the Judicature Act, R.S.O. 1914, c. 56, as follows:

34. Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it.

35.—(1) On the trial of any issue, or on any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a time certain, interest may be allowed from the time when the debt or sum became payable.

(2) If such debt or sum is payable otherwise than by virtue of a written instrument at a time certain, interest may be allowed from the time when a demand of payment was made in writing, informing the debtor that interest would be claimed from the date of the demand.

(3) In actions for the conversion of goods or for trespass *de bonis asportatis*, the jury may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and above the money recoverable thereon.

(4) Unless otherwise ordered by the court, a verdict or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, notwithstanding that the entry of judgment shall have been suspended by any proceeding in the action including an appeal.

CHAPTER IX.

SUPPLEMENTARY PROVISIONS AND DEFINITIONS.

It seems convenient, for the purpose of ready reference, to gather in this final chapter the various general provisions which in the statute appear under the heading "Supplementary," as well as the definitions, which in the United Kingdam are contained in s. 62 of the statute, but in most of the provinces of Canada are contained in s. 2.

In the United Kingdom and in Ontario the statute is entitled "An Act for codifying the law relating to the Sale of Goods," the short title in the United Kingdom (s. 64) being the Sale of Goods Act, 1893, and in Ontario (s. 1) the Sale of Goods Act, 1920.

The Sale of Goods Act being, like the Bills of Exchange Act, a code, the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law. An appeal to earlier decisions can be justified only on special grounds, as, for instance, if a provision of the code is of doubtful import, or if words are found which have previously acquired a technical meaning or been used in a sense other than their ordinary one.

> Bank of England v. Vagliano, [1891] A. C. 107, at pp. 144-5, 3 R.C. 695, at pp. 728-9 (Bills of Exchange Act); Robinson v. Canadian Pacific Ry. Co., [1892] A. C. 481, at p. 487 (Civil Code of Lower Canada).

In the United Kingdom the interpretation section of the Sale of Goods Act (s. 62) begins with the words "In this Act, unless the context or subject-matter otherwise requires," whereas in Ontario the words are simply "In this Act," because in Ontario it is provided by the Interpretation Act, R.S.O. 1914, c. 1, ss. 2 and 3, that an interpretation section or provision in an Act shall apply except in so far as it

(a) is inconsistent with the intent or object of such Act; or

(b) would give to any word, expression or clause of any Act an interpretation inconsistent with the context; or

(c) is in any such Act declared not applicable thereto.

In Ontario the Sale of Goods Act (s. 2) provides as follows, the definitions in the original statute (s. 62) being in the same terms, except as hereinafter noted:

2. In this Act—

(a) "Action" shall include counterclaim and set off;

[In the United Kingdom it is provided by s. 62:

"Action includes counterclaim and set-off, and in Scotland condescendence and claim and compensation.

"Bailee" in Scotland includes custodier.]

(b) "Buyer" shall mean a person who buys or agrees to buy goods;

(c) "Contract of sale" shall include an agreement to sell as well as a sale;

[In the United Kingdom it is provided:

"Defendant" includes in Scotland defender, respondent, and claimant in multiple-poinding.

(d) "Delivery" shall mean voluntary transfer of possession from one person to another;

(e) "Document of title" shall include any bill of lading and warehouse receipt, as defined by the *Mercantile Law Amendment Act*, any warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive goods thereby represented;

[In the United Kingdom it is provided:

"Document of title to goods" has the same meaning as it has in the Factors Acts.

"Factors Acts" means the Factors Act, 1889; the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same].

(f) "Fault" shall mean wrongful act or default;

[In the United Kingdom it is provided:

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

This definition is also contained in Ont. s. 7; U.K. s. 5].

(h) "Goods" shall include all chattels personal other than things in action and money; and shall include emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

[In the United Kingdom it is provided:

"Lien" in Scotland includes right of retention].

(i) "Plaintiff" shall include a defendant counterclaiming;

[In the United Kingdom it is provided:

"Plaintiff" includes pursuer, complainer, claimant in a multiple-poinding, and defendant or defender counterclaiming].

(j) "Property" shall mean the general property in goods and not merely a special property;

(k) "Quality of goods" shall include their state or condition;

(l) "Sale" shall include a bargain and sale as well as a sale and delivery;

(m) "Seller" shall mean a person who sells or agrees to sell goods;

(n) "Specific goods" shall mean goods identified and agreed upon at the time the contract of sale is made;

(o) "Warranty" shall mean an agreement with reference to goods which are the subject of a contract of sale but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

[In the United Kingdom this definition applies only to England and Ireland. As regards Scotland, it is provided that a breach of warranty shall be deemed to be a failure to perform a material part of the contract.]

The Sale of Goods Act (Ont. s. 2; U.K. s. 62) provides:

2.—(2) A thing shall be deemed to be done in good faith within the meaning of this Act when it is in fact done honestly whether it be done negligently or not.

(3) A person shall be deemed to be insolvent within the meaning of this Act, who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due.

[In the United Kingdom the following words are added at the end of sub-s. 3:

"Whether he has committed an act of bankruptcy or not and whether he has become a notour bankrupt or not."]

(4) Goods shall be deemed to be in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

The Sale of Goods Act (Ont. s. 54; U.K. s. 55) provides:

54. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

The Sale of Goods Act (Ont. s. 55; U.K. s. 56) provides:

55. Where by this Act any reference is made to a "reasonable time," the question what is a reasonable time is a question of fact.

The Sale of Goods Act (Ont. s. 46; U.K. s. 57) provides:

56. Where any right, duty or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

The Sale of Goods Act (Ont. s. 57; U.K. s. 58) provides:

57. In case of a sale by auction—

(*a*) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale;

(*b*) a sale is complete when the auctioneer announces its completion by the fall of the hammer or in any other customary manner; and until such announcement is made any bidder may retract his bid;

(*c*) Where a sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraululent by the buyer;

(*d*) a sale may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller;

(*e*) where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

If at a sale of goods by auction two or more intending buyers, with the object of keeping down the price, agree that they will not bid against each other, but that one of them only shall bid, and that the goods bought by him shall be shared between them, that agreement is not unenforceable as being against public policy.

Rawlings v. General Trading Co., [1921] W. N. 23, C.A., reversing [1920] 3 K.B. 30.

There is another kindred matter in connection with which the common law courts took a stricter view than the courts of equity, namely the employment of a puffer at an auction. But this conflict was ended by the Sale of Land by Auction Act, 1867, which provided that the common law rule should prevail; and the provisions of that statute have

since been extended to sales of goods by auction by the section of the Sale of Goods Act above quoted.

Rawlings v. General Trading Co., [1920] 3 K.B. 30.

It is provided in Ontario by the Law and Transfer of Property Act, R.S.O. 1914, c. 109, ss. 51-54, as follows:

51. Unless in the particulars or conditions of sale by auction of any land it is stated that such land will be subject to a reserved price, or to a right of the seller to bid, the sale shall be deemed to be without reserve.

52. Upon any sale of land by auction, without reserve, it shall not be lawful for a seller or for a puffer to bid at such sale, or for the auctioneer to take, knowingly, any bidding from the seller or from a puffer.

53. Upon any sale of land by auction, subject to a right for the seller to bid, it shall be lawful for the seller or any one puffer to bid at such auction in such manner as the seller may think proper.

54. Nothing in the next preceding three sections shall authorize any seller to become the purchaser at the sale.

The Sale of Goods Act (Ont. s. 58; U.K. s. 61) provides:

58.—(1) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(2) Nothing in this Act shall affect enactments relating to conditional sales, bills of sale or chattel mortgages, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

In the United Kingdom the provisions just quoted form sub-ss. 2, 3 and 4 of s. 61, the words "conditional sales" in

sub-s. 2 of the Ontario section being omitted, and the following being sub-ss. 1 and 5:

61.—(1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

In Ontario the Sale of Goods Act provides:

59. The following enactments are repealed, namely:

Section 12 of The Statute of Frauds, being chapter 102 of the Revised Statutes of Ontario, 1914;

Sections 9, 10 and 11 of The Factors Act, being chapter 137 of the Revised Statutes of Ontario, 1914;

but such repeal shall not affect anything done or conferred, or any right, title or interest agreed upon before the commencement of this Act or any legal proceedings in respect of such right, title or interest.

In the United Kingdom the corresponding section (s. 60), repeals, subject to similar proviso, an Act against Brokers (1 Jac. 1, c. 12), ss. 15 and 16 (commonly cited as ss. 16 and 17) of the Statute of Frauds, s. 7 of Lord Tenterden's Act (9 Geo. 4, c. 14), ss. 1-5 of the Mercantile Law Amendment (Scotland) Act, 1856, and ss. 1 and 2 of the Mercantile Law Amendment Act, 1856.

In the United Kingdom, under s. 63 of the Sale of Goods Act, the statute came into operation on the 1st of January, 1894. In Ontario, under s. 60, the statute came into operation on the 1st of July, 1920.

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